











REPORTS OF CASES  
DETERMINED IN THE  
PRACTICE COURT  
AND  
CHAMBERS.

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BY HENRY O'BRIEN, ESQ.,  
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TORONTO :  
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REPORTS OF CASES  
IN  
PRACTICE COURT  
AND  
CHAMBERS.

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MOORE v. PRICE ET AL.

*Certificate for costs—Stat. Ont. 31 Vic. ch. 24, secs. 1, 2.*

A certificate under the above Act was granted, after a verdict for \$118, "to entitle the plaintiff to County Court Costs."

*Held*, That there could not be a set-off of costs on such certificate.

[CHAMBERS, January 14, 1869.]

IN this action, a verdict having been found for the plaintiff for \$118, Mr. Justice Gwynne, before whom the case was tried, certified on the record as follows, "I certify to entitle the plaintiff to County Court costs."

The plaintiff taxed County Court costs, in the presence of the defendants' attorney, at \$66.76, which taxation was admitted by the attorneys for both parties to be correct.

The defendants' attorney then produced, and required the taxing officer to tax, a Superior and County Court Bill, claiming that he had a right to set off the difference between the two bills produced by him against the plaintiff's costs.

The taxing officer refused to allow any set-off for costs to the defendants.

It was agreed that if the defendants were entitled to set off costs against the plaintiff, the amount that ought to be so set off was \$26.33.

The question arose under the 31 Vic. (Ont.) chap. 24, sec. 2, sub-secs. 2 and 4, particularly, and the effect of the Statute generally; and the question under the circumstances disclosed, was whether the defendants had a right to set off costs of defence against the plaintiff's costs and verdict.

The parties appeared before a Judge in Chambers by consent, when

JOHN WILSON, J. ordered the Master to tax to the plaintiff County Court costs, and not tax to defendants any costs of suit.

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#### SHARP & SECORD v. ROBERT MATTHEWS.

*Insolvent Act of 1864, sec. 3, cl. c. and sub-sec. 7—Writ of attachment—Grounds for—Affidavit—Form of, and who can make.*

The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor his debt, does not bring the debtor within sec. 3, clause c., of the Insolvent Act, 1864.

In entitling affidavits for an attachment under the Insolvent Act, 1864, form F. should be followed.

Sec. 3, ss. 7, is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts and circumstances relied on as constituting insolvency.

[CHAMBERS, January 26, 29, 1869.]

ON the 6th of January, the Judge of the County Court of the county of Wentworth made an order for a writ of attachment to issue out of that Court against the above-named defendant as an insolvent, at the suit of the above plaintiffs. On the 7th of January the writ was served. On the 9th of January the defendant filed his petition in the County Court praying that the writ of attachment might be set aside. The petition was accompanied with the affidavits of the defendant, and two other persons, testifying to the *bona fides* of the transaction which the plaintiffs assailed as exposing the defendant to compulsory liquidation under the Insolvent Act. The petition also assailed the proceedings of the

plaintiffs as defective in the following particulars:—1st. That the affidavits filed by plaintiffs disclosed no grounds to warrant the order and writ of attachment. 2nd. That they shewed that defendant was not insolvent. 3rd. That they afforded no sufficient evidence that he had parted with his estate and effects with intent to defraud, defeat, or delay creditors. 4th. That the said affidavits are entitled in a cause, whereas there was not, until the issuing of said writ, any cause in court.

Upon this petition a summons was issued, calling upon the plaintiffs to shew cause why the writ of attachment should not be set aside. Upon this summons being heard, the Judge, on the 19th day of January, made an order setting aside the writ of attachment, and all subsequent proceedings, on the merits.

Notice of an application for an allowance of an appeal from this order was given. On its return,

*J. B. Read* opposed the allowance, as well on the grounds stated in the defendant's petition in the County Court as on the merits disclosed in the affidavits filed by the defendant with that petition.

GWYNNE, J.—I am opinion that no appeal should be allowed in this case, and that the order of the Judge setting aside the writ of attachment was a proper one to be made in the premises. The affidavits filed, on which the writ of attachment issued, do not, in my opinion, shew that the estate of the defendant has become subject to compulsory liquidation. It appears by the affidavit of the plaintiff George Reid Secord, that the plaintiffs are the defendant's sole creditors; that within a few days preceding, the defendant had sold and disposed of real estate in the city of Hamilton for \$1,900, receiving in payment therefor cash and mortgages, and that he is now about to assign said mortgages with intent, as the deponent believes, to defraud the plaintiffs of their said debt; that the defendant has not to the best of deponent's knowledge and belief, any other

assets or property of any value that are or can be made liable for the payment of the said debt; that the debt has been overdue for some time—that, in brief, he has the means of paying the plaintiffs' debt, which is the only debt due by him, and that he refuses to pay it, or to give the plaintiff any satisfaction as to what he is going to do with the proceeds of the sale of the land further than that he would pay his debts, and that, with reference to the plaintiffs' claim, defendant said that he would pay just as much as he had a mind to. The affidavit has attached to it a copy of a letter from a gentleman acting as solicitor of the defendant, in which the defendant disputes the correctness of the amount of the plaintiffs' claim, and offers, without prejudice, \$200 for a discharge in full. There was also an affidavit of the plaintiffs' book-keeper, deposing to the correctness of the amount claimed by the plaintiffs, viz: \$500. This deponent also swears as follows:—"I am credibly informed and verily believe that the defendant has lately disposed of his property and is now about to assign and dispose of the mortgages taken by him for the balance of the purchase money thereof, with intent to defraud the plaintiffs of their debt." There was also an affidavit of Mr. Gibson, a solicitor, who deposes as follows:—"I am aware of the defendant having, during the past week, sold lot number three in Moore's survey of this city, a portion thereof to one George Matthews for the sum of \$700, and the remainder of the said lot to one Robert Kelly for the sum of \$1200. The said Robert Kelly paid in cash the sum of four hundred dollars and gave a mortgage to the said defendant for the balance of \$800. I am not aware what amount was paid down by the said George Matthews, but I think there was about \$300, and a mortgage was given by the said George Matthews to the defendant for the balance. In the carrying out of the said sale I acted for Robert Kelly, one of the purchasers, and in the course of the transaction, Mr. Sadleir, solicitor for said defendant, said, in my presence, that he would want to have access to the abstracts of title as he was going to negotiate the mortgages."

Now these affidavits shew that the sale of the land was *bonâ fide* for value, and all that the application for the attachment rests upon is the affidavit of the plaintiff Secord and that of his book-keeper, that in their belief the defendant is about to assign the mortgages with intent to defraud the plaintiffs of their claim, without any facts or circumstances being stated or at all shewn to lead to that belief, unless it be what is stated in Mr. Gibson's affidavit, that Mr. Sadleir said he would want to have access to the abstracts of title, as he was going to negotiate the mortgages. Now if the intended disposition of the mortgages is by actual sale of them and not a *fraudulent* disposition of them, I apprehend that the entertaining such an intent to make an actual sale would no more expose a person to compulsory liquidation than the actual sale itself would. The whole gist of the affidavits of plaintiff and his book-keeper must, I think, be taken to be merely that the defendant intends to make sale of his property, that is, an actual out-and-out sale; but that they apprehend he will not then, although perfectly able and owing no one else anything, pay the plaintiffs their debt. I do not think the entertaining such an intent brings the party entertaining it within the clause *c* of the 3rd sec. of the Insolvent Act. But then, in his petition to set aside the writ of attachment, the defendant swears that he sold the land to pay off a mortgage upon it, by which he was subject to 10 per cent. interest: that he has paid off that mortgage, and that he does intend to sell the mortgages taken by him for balance of purchase money for the purpose of paying the plaintiffs what he believes he owes them and of supporting his family, and he denies that he owes the plaintiffs anything like the amount claimed by them to be due. This affidavit is accompanied by affidavits of George Matthews and Kelly, who swear that their purchases were *bonâ fide* and made for full value. I can see nothing in the affidavits to justify a suspicion of fraudulent disposition of property, of an attempt fraudulently to dispose of property within the meaning of the Insolvent Act.

I have been asked to express my opinion upon two minor points which in the view I take are not necessary to be deci-



ded in this case, namely, whether the affidavits filed on the application for the attachment are properly entitled, and whether sub-sec. 7 of sec. 3 requires that the two persons to speak to the facts and circumstances constituting insolvency within the meaning of the Act, must or not be other persons than the creditor or his agent testifying to the debt. I entertain no doubt that it is proper to entitle the affidavits with the names of the plaintiffs and defendants as in the form F given in the statute. The 13th sub-sec. of sec. 11 enacts that the forms appended to the act, or other forms in equivalent terms, shall be used in the proceedings for which such forms are provided, and it appears to me to be always best to follow the forms given by an act. 'The very' first paragraph of the affidavit speaks of a cause, although, strictly speaking, there is none until the writ issues, and of a plaintiff in the cause. The second speaks of "the defendant" as likewise does the third. These expressions plainly point to the cause in the title of the affidavit, and if this should be omitted the frame of the body of the affidavit would be insensible.

It appears to me also that sub-sec. 7 of sec. 3 is complied with, although the creditor or his agent deposing to the debt should be also one of the two persons testifying to the facts and circumstances which are relied upon as constituting the insolvency. I see no reason why we should introduce into the statute the word "other," which the legislature has not thought fit to introduce between the words "two" and "credible persons" so as to make it read "and also shew by the affidavits of two other credible persons," &c. It might be that a creditor and his clerk could give the clearest evidence of insolvency and liability to compulsory liquidation from the lips of the debtor himself to them in private which could not be established otherwise, and in such case, although there were two credible persons, the attachment might be deferred injuriously to the creditors; but whether it would be desirable or not desirable to have two persons other than the creditor to speak to the acts of insolvency it is sufficient to say that, in my opinion, the statute does not say that it is

requisite. It is said that the preceding clause indicates the intention of the legislature that in Upper Canada the creditor should not be one of the two, because it provides that in Lower Canada the creditor alone may prove the debt and the acts of insolvency. Why the creditor alone should be deemed sufficient in Lower Canada and not in Upper Canada I cannot say, but I see no necessary inference from that, that he cannot be one of the two required in Upper Canada. If the legislature intended to exclude him it would have been very easy to have done so by the insertion of the word "other;" moreover the form of affidavit given is the same in Lower Canada and Upper Canada for the creditor to make, and plainly contemplates that he may state the facts relied upon as rendering the debtor insolvent.

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BOYD ET AL. V. HAYNES, (BRITISH AMERICA ASSURANCE  
COMPANY, GARNISHEES.)

*Attachment of debts—Affidavit for—Verdict—Equitable interest.*

An order to attach a debt should not be made without an affidavit either of the plaintiff or his attorney, stating the indebtedness of the garnishee. A verdict against an insurance company for unliquidated damages, even although not moved against, and which the company had promised to pay without entry of judgment, cannot be attached until it becomes a debt by judgment.

A debt due by the garnishee to a person who is a trustee of it for the judgment debtor cannot be attached to satisfy the judgment debt; there must be a legal debt due by a legal debtor to a legal creditor.

[CHAMBERS, February 1, 1869.]

LAST Term a rule was made by the Court of Queen's Bench attaching all debts due and owing or accruing due from the garnishees to the judgment debtor. This rule was obtained on an affidavit of the plaintiff Bunting, and his attorney, to the effect that judgment had been recovered against Haynes: that one Arnold had obtained a verdict against the garnishees, and that it was believed

that Arnold was trustee for Haynes, and that Haynes was beneficial owner of the money: that the verdict still stood, and no rule or motion had been made to disturb it: that the policy was made to Arnold, and afterwards assigned by him to one Hays: that the garnishees' attorney had that day told plaintiffs' attorney that the company had promised to pay and would pay the defendant the verdict recovered without the said Arnold entering judgment, and had settled upon the amount of costs.

On 18th December, a summons was granted by J. Wilson, J., calling on the garnishees, the judgment debtor, and Hays, to shew cause why the garnishees should not pay over, &c.

The garnishees appeared and professed to be ready to pay to any person the Court might direct.

*Spencer* appeared for the judgment debtor and for Hays. On behalf of Hays he claimed that the debt sought to be garnished was duly assigned to him for value, on the 6th November, 1868, before the attaching order was made. The objection was also taken that the alleged debt was not garnishable, and that even if it were, it had been assigned for value to Hays. He cited *Jones v. Thompson*, 1 E. B. & E. 63; *Dresser v. Johns*, 6 C. B. N. S. 429; *Webster v. Webster*, 6 L. T. N. S. 11; *Clark v. Clark*, 8 U. C. L. J. 107; *Hirsch v. Coates*, 18 C. B. 757; *Johnson v. Diamond*, 11 Exch. 73; Arch. Prac. 12th ed. 712, 713, 714.

*Duggan*, Q. C., supported the summons.

HAGARTY, C. J.—I think the rule to attach would not have been granted if the attention of the court had been directed to the affidavits filed.

There is no affidavit from either the plaintiff or his attorney, that these garnishees or any person are or is indebted to the defendant Haynes as required by the statute, and which statement, in my judgment, is indispensable to ground the jurisdiction of any court or Judge to attach a debt. I only notice this, however, as bearing on the main



question, whether the alleged debt is garnishable. Could any one safely swear that these garnishees were or are indebted to Haynes either before or after judgment signed in Arnold's suit?

As a general rule, a verdict for unliquidated damages cannot be attached. It is attempted here to distinguish this case, because the garnishees' attorney told the judgment creditor's attorney that they had agreed on the costs and promised to pay without entering judgment.

In my opinion, that leaves the claims just where it was before; if not a debt till judgment, I cannot see how this conversation can make it a debt.

That it is not a debt is shewn by *Jones v. Thompson*, E. B. & E. 63. *Dresser v. Johns*, 6 C. B. N. S. 429, is very strong—On a similar verdict judgment was signed on 8th March: on 4th March, Dresser obtained an attaching order, and on same day one Chilton obtained a similar order: on 10th March, after judgment entered, Chilton obtained another attaching order. The whole matter came before the Court on motion of Chilton to rescind the order of 4th March, and calling on Dresser to pay all the costs, and that the money paid into court on a summons to pay over obtained by Dresser, should be paid to Chilton. It was urged that the garnishees did not dispute the matter. Crowder, J., says “although the garnishees make no objection, can there be an order under the statute when upon the face of the matter it appears that there is no debt? \* \* If there was no debt there can be no valid order.” This last was in answer to the argument, that as between two judgment creditors such a question could not arise. In giving judgment, the same Judge says, as to the two attaching orders of 4th March, “at that time there was no debt owing or accruing from the company to Johns, judgment not having then been signed; both therefore were acting in mistake; for there could be no proper application under the C. L. P. Act, 1854, until there was a debt, viz., on 8th March, when judgment was signed. \* \* *Jones v. Thompson* is a direct decision, and as we all think a correct decision, that

there was no debt owing or accruing until the final judgment was signed on 8th March."

In *Webster v. Webster*, 6 L. T. N. S. 13, the Master of the Rolls says: "an attachment can only affect property for which the defendants can maintain an action against the garnishees."

In *McDowall v. Hollister*, 25 L. T. Rep. 185, Parke, B., says, "It must be a legal debt due from a legal debtor; you cannot have an order to attach a legacy in the hands of an executor." It was sworn that the executor was ready to pay; and again it was said by the court, "unless there has been such an account stated as would enable the parties to maintain an action the legacy could not be attached."

In *Geraghty v. Sharkey*, 30 L. T. Rep. 204, it is said, "it was never intended by the Legislature to refer to any other than a legal debt;" and see *Sparks v. Young*, 8 Ir. C. L. R. 251.

In *Miller v. Mynn*, 1 El. & El. 1075, Lord Campbell says, "The object was to make debts due to a judgment debtor of the nature of chattels, and to make them as it were liable to be taken in execution, so that the analogy between an attachment and a *fi. fa.* is very close."

I am of opinion that this claim against the garnishees was, on the authorities, not garnishable before becoming a debt by judgment.

There is the further difficulty which I do not see how to meet, that the debt, if any, of the garnishees is a debt to Arnold and not to Haynes, the judgment debtor. Arnold may be a trustee for Haynes, but still I think that so long as a chose in action is not assignable at law, the legal debt is due to Arnold, as Parke, B., said, "there must be a legal debt due from a legal debtor;" I think we may add "and to a legal creditor." Haynes could maintain no action against the garnishees. I think on both these grounds the application fails.

I make no order as to costs. A rule was granted by the full court to attach, and Mr. Hays' affidavits are not such as to warrant my giving him costs.

## REG. EX REL. FLUETT V. SEMANDIE.

*Municipal election—Qualification for Councillor—Personal property—Roll.*

- Held*, 1. That a person cannot qualify as town councillor on personal property.
2. That when a candidate was assessed on the roll for real property to the amount of \$750 (\$50 less than the freehold qualification required), he could not supplement it by an addition of \$400 assessed to him on personal property.
3. The assessment roll is conclusive as to the rating of those mentioned in it.

[CHAMBERS, February 19, 1869.]

THIS was a *quo warranto* summons at the instance of a voter, to unseat the defendant, who claimed to be one of the councillors elect of the town of Sandwich for the year 1869, at an election held on the 4th of January last. The ground alleged in the statement of the relator was that the defendant was only assessed on the assessment roll for the year 1868, being the last revised assessment roll, at and for the sum of \$750. This assessment was on real property to that amount, but he was also assessed for personal property to the amount of \$400, which, added to the real property, would make \$1150. The qualification required by the Municipal Institutions Act, 29-30 Vic., chap. 51, sec. 5, for councillors, &c., in towns, is "freehold to \$800, or leasehold to \$1600."

Several objections were taken by the defendant, and several affidavits were filed on both sides, but the case turned upon the question as to whether the defendant had a sufficient qualification under the above facts.

*Warmoll*, for the defendant, shewed cause. The defendant is, in fact, sufficiently qualified, though by a mistake in the assessment roll it does not so appear, and what is rated there as personal property should have appeared as real property. At all events, the qualification is sufficient, as the deficiency of \$50 as to the real property is supplied by the \$400 of personal property.

*Harrison*, Q. C., for the relator, supported the summons.

1. There must be a qualification in respect of "a legal or

equitable freehold or leasehold," and mere personal property is not sufficient: Assessment Act, 29-30 Vic. chap. 53, secs. 3, 4, and sec. 21, sub-sec. 4, col. 13.

2. The property which is relied upon as forming part of the qualification must appear on the roll: *Reg. ex rel. Metcalfe v. Smart*, 10 U. C. R. 89; *Reg. ex rel. Carroll v. Beckwith*, 1 Prac. R. 278, and see *Har. Mun. Manual*, 54, note *r*.

2 The rating, as it appears on the assessment roll, is final and conclusive, and the defendant cannot go behind it: *Reg. ex rel. Ford v. Cottingham*, 1 U. C. L. J. N. S. 214; *Reg. ex rel. Chambers v. Allison*, *Ib.* 244; *Reg. v. Tugwell*, L. R. 3 Q. B. 704. See also sec. 75 of the Municipal Act.

JOHN WILSON, J.—A candidate for the office of town councillor cannot qualify for such on personal property. The statute does not permit it. The qualification must be on real or leasehold property, up to a specified amount. Nor can a candidate, as the defendant seeks to do here, supplement the qualification, which is insufficient as to amount on his real property, by adding thereto personal property even though more than sufficient to make up the deficiency. The assessment roll is conclusive as to the rating, and no enquiry can be allowed outside it, as to whether the candidate had more real property than that which appeared on it.

*Judgment for relator.*

### REG. EX REL. ARNOLD V. WILKINSON.

*Municipal Election—Town of Sandwich—Interpretation of Statutes—20 Vic. cap. 94—31 Vic. Ont. cap. 30, sec. 6.*

A special Act of Parliament cannot be repealed by a general enactment, except when there is express reference to it; 20 Vic. cap. 94, therefore is not repealed by 29-30 Vic. cap. 51, sec. 428.

The town of Sandwich is only entitled to three councillors in addition to a mayor and reeve to be elected by the people.

[CHAMBERS, February 25, 1869.]

THE statement of the relator (who claimed an interest in



the election as a duly qualified elector) complained that the defendant usurped the office of mayor of the town of Sandwich, under the pretence of an election held there on the 21st day of December, 1868, and stated as a ground for unseating him, that no meeting for the nomination for the office of mayor of the said town had taken place, nor had any election for that purpose been held.

The facts appeared on the affidavit of Mr. Marcon, the returning-officer, as follows:—

“That I was returning-officer at the last municipal elections held at the town hall, in the town of Sandwich, on Monday, the 21st day of December, 1868 : that on or about the 14th day of December, 1868, I caused to be posted up at different places in the town of Sandwich copies of the printed notice hereunto annexed : that on the said 21st day of December, 1868, I attended at the hour of ten o’clock in the forenoon, at the said town hall, as such returning-officer, for the purpose of receiving nominations for the office of reeve for the said town, for the ensuing year 1869 : that during the hour appointed by law for receiving such nominations, one Thos. Woodbridge, of the town of Sandwich, handed me a slip of paper, on which the following words were written— ‘Moved by Mr. Woodbridge, seconded by Mr. Thos. McKee, that James H. Wilkinson, Esq., be mayor of the town of Sandwich for the year 1869 :’ that I at once informed Mr. Woodbridge and the electors then present, that I declined to receive such nomination, as the meeting had not been called for that purpose, and that, by the advice of counsel, the mayor of the town of Sandwich should be elected from among the councillors at their first meeting : that consequently I never declared the said James Hands Wilkinson, or any other person, duly elected to the office of mayor for the said town of Sandwich, for the year 1869 : that the office of mayor for the said town of Sandwich has for some years past been filled by some person elected from amongst the five councillors for the said town of Sandwich, at their first meeting in each year : that on Monday, the 18th day of January, 1869,

being the day appointed by statute for the first meeting of the council of the said town, the said James Hands Wilkinson neglected to attend the said meeting, and to make any declaration of office or qualification: that on Thursday, the 21st day of January, 1869, the said James Hands Wilkinson handed to me this deponent, as town clerk of the said town of Sandwich, a declaration of office and qualification as mayor of the said town of Sandwich: that the said declaration of office and of qualification severally purport to have been sworn before one William Bain, as a justice of the peace."

The town of Sandwich was incorporated by 20 Vic. ch. 94, the enactments of which, so far as they affect this case, are as follows:

Section 2. "So much of the Upper Canada Municipal Corporations Acts as relates to incorporated towns shall, from and after the day last aforesaid (1st Jan. 1858), apply to the said town of Sandwich, and the said town shall, as an incorporated town, have and exercise all and singular, the rights, powers, privileges and jurisdictions which are thereby granted or conferred to or upon, or as shall by virtue of the said act, or of any other act or acts now in force or hereafter to be in force in Upper Canada, belong to incorporated towns; and all the rules, regulations and enactments in the said acts or any of them contained, or which shall in any wise apply to incorporated towns, shall apply to the said town of Sandwich as fully as if it had become an incorporated town under the ordinary operation of the said Upper Canada Municipal Corporations Acts, with the exception hereinafter made."

Section 3. "The said town of Sandwich shall not be divided into wards, but the whole of it shall be considered as one ward, and shall be represented by five councillors, who shall form the town council thereof."

Sections 4 & 5 provide that the sheriff shall be returning officer, and preside at the first meeting of the council.

Section 6. "The qualifications of candidates and electors at such first election, shall be the same as the qualifications



for candidates and electors respectively, at elections for municipal councils in towns in Upper Canada."

Section 7. "The first meeting of the town council of the town of Sandwich, shall be held in the court house in the said town of Sandwich, at the hour of twelve o'clock noon, on the second Monday next after such first election."

Section 9 repeals all Acts, &c., inconsistent with this, so far as the town of Sandwich is concerned.

*Warmoll*, for the defendant, shewed cause.

*Harrison*, Q. C., for the relator, supported the summons. The meeting called by the returning officer was not for the nomination of mayor; there was in fact no election of a mayor, and therefore the defendant cannot be such: see 29-30 Vic., chap. 51, secs. 105, 107, 108, 110, 115, 121, and 122. This case is not affected by the general municipal law, (29-30 Vic., ch. 51). The 20 Vic. ch. 94, regulates the municipal affairs of the town of Sandwich; and a general Act of Parliament does not repeal or affect a prior special act, without express words of reference: *Dwarris* on Stat., 621; *Birkenhead R. W. Co. v. Laird*, 4 De G., McN. & G. 732; *Fitzgerald v. Champneys*, 7 Jur. N. S. 1006; *Purnell v. Woolverhampton W. Co.*, 4 L. T. N. S. 513.

JOHN WILSON, J.—A special Act of Parliament cannot be repealed by a general enactment, except when there is express reference to it. The statute 20 Vic. ch. 94, is not therefore repealed by 29-30 Vic. ch. 51, sec. 428.

The late act amending the Municipal Act of 1866 (31 Vic. ch. 30, sec. 6, of Ontario), must be read in connection with the act incorporating the town of Sandwich (20 Vic. ch. 94, secs. 2, 3), and so reading them, the town of Sandwich, having only one ward, is entitled only to three councillors, in addition to a mayor and a reeve, who must, however, be elected by the people.

I shall give no costs, as the point is doubtful, owing to the

loose way in which the repealing clause in the Municipal Act was drawn.

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REG. EX REL. FLUETT V. GAUTHIER.

*Municipal election—Disqualification of candidate—Quasi contract with Corporation.*

The trustees of a common school in the town of Sandwich being about to erect a school house, the defendant Gauthier offered to supply a certain quantity of brick to them for that purpose. They told him that if the town council would agree to pay him for the bricks they would take them. He then said that he would take payment for them by letting the amount go against his taxes in each year, with interest at eight per cent. upon the whole amount unpaid. This proposition was made by defendant in person to the town council and was accepted by them. The defendant furnished the bricks. *Held*, that under these circumstances the defendant was disqualified from sitting as a councillor of the town. The Statute disqualifying a contractor from sitting as a councillor of a municipality, does not require that the contract should be binding on the corporation.

[CHAMBERS, February 26, 1869.]

THE statement of the relator complained that the defendant Gauthier was not duly elected and unjustly usurped the office of councillor in the town of Sandwich, under the pretence of an election held on Monday, 4th January, 1869.

The grounds stated for declaring the election invalid and void were:—That the said Jean Baptiste Gauthier was a contractor, and had dealings with the council of the municipal corporation of the town of Sandwich in manner following, namely: that he had agreed with the said council of the said municipal corporation of the town of Sandwich, to furnish sufficient brick for the erection of a school house in the said town of Sandwich, at and for the price of five dollars per thousand, and that he the said Gauthier should be paid therefor each year by a settlement in full of his taxes until the amount should be covered, receiving interest at the rate of eight per cent. per annum upon the unpaid amount: that the said agreement was so entered into by the said Gauthier with the said council on or about the twenty-third day of June, 1868, and was still in full force.

Several affidavits were filed to shew the nature of the dealings between the defendant Gauthier, the school trustees, and the town Council.

The facts sufficiently appear in the following affidavits :

1. That of Joseph Miller, merchant, of the town of Sandwich, who stated :—“ That during the year 1868, he was a duly elected, and at the time of making this affidavit still was, one of the trustees of the common school of the said town : that prior to the 23rd day of June, 1868, as one of the committee of the board of common school trustees of the said town, he saw the defendant Jean Baptiste Gauthier, in regard to the mode of payment to him for the bricks to be by him furnished for the building of the common school of the said town, known as school number one : that the said Gauthier then said that he would furnish the necessary brick for the erection of the said school house, provided that the town council of the said town would become security to him for the payment thereof : that the said Gauthier further said that he would be willing to take his pay for the said bricks so to be furnished by him for the purposes aforesaid, by the remission of his taxes in each year with interest thereon at the rate of ten per cent. per annum upon the whole unpaid principal amount remaining due and unpaid : that on or about the 23rd day of June, 1868, he, the deponent, together with the defendant, Gauthier, attended at a meeting of the the town council of the said town, and laid the proposition of the said Gauthier as above set forth before the members of the said council, and the said Gauthier then and there agreed to accept a lower rate of interest upon the unpaid amount that would accrue due to him for the said bricks, to wit the rate of eight per cent. per annum, in the place and stead of ten per cent. as aforementioned : that he never intended that the board of common school trustees of the said town should become responsible to the said Gauthier for the payment of the said brick, as the said board of common school trustees had no means of paying therefor, and he, deponent, was afraid that if such an agreement was entered into by the said board and the said Gauthier, that the members of the

committee appointed to superintend the erection of the said school house, number one, might become personally liable for the payment of the said brick to the said Gauthier; and as he, deponent, was the only member of the said committee who qualified as such trustee on property held in his own right, and not in the right of his wife, that he was greatly afraid, if such an arrangement was entered into, that he, the deponent, might have to pay for the said bricks out of his own pocket: that after the proposition aforementioned of the said Gauthier was made to the said council, on the said 23rd day of June, 1868, and whilst the said Gauthier to the best of his knowledge and belief was present, a motion was put to the said council by the mayor of the said town, then presiding at the said meeting, to the effect that the proposition of the said Gauthier be accepted and that he receive at the rate of \$5 per thousand for the said brick so by him to be furnished for the erection of the said school house number one, and that his taxes be remitted to him in each year until the whole amount thereof, with interest at the rate of eight per cent. per annum on the unpaid principal amount, be fully paid and satisfied: that he then understood and verily and truly believed that the said motion was carried without a single dissenting voice from any of the members of the said council: that the said Gauthier seemed perfectly satisfied with the said arrangement, and expressed himself as so satisfied on subsequent occasions: that no requisition of said board was subsequently made, to his knowledge, to the said council to enable the said board to fulfil their said alleged agreement with the said Gauthier: that he did attend at the last mentioned meeting of the town council of the said town, but simply to inform the council of the amount of money that was due to the said Gauthier, for the bricks so furnished by him as aforesaid, and thereupon he heard instructions given to the clerk of the said council to open an account with the said Gauthier, for the payment for the said brick in manner aforesaid, but did not hear any orders given to the clerk to open an account with the said board of common school trustees in regard to the payment of the said brick, and if such order had been given, he should at



once have protested against it, as he had always understood, and it was his intention, that the settlement for the said brick was entirely between the said Gauthier and the municipal council of the corporation of the town of Sandwich."

2. The affidavit of George Felles, mayor of the town of Sandwich, stated:—"That he was present as mayor of the said town, at a meeting of the municipal council of the said town, held on Tuesday, the 23rd day of June, 1868, at which a full board of the said council was present: that in his capacity as mayor of the said town, he presided at the said meeting of the said council, and put the motion hereafter written to the said meeting, which motion was unanimously carried: that the words of the said motion as he found them on the minutes of the proceedings of the said meeting, were as follows, that is to say, "moved by Mr. Woodbridge, seconded by Mr. Chalmers, that the proposition of Mr. Baptiste Gauthier to furnish sufficient brick for the school house be accepted, and that the price to be paid for the said brick be \$5 *per mill*, and that he be paid each year by a settlement in full of his taxes until the amount be paid, receiving interest at the rate of eight per cent. for the same upon the unpaid amount.—'Carried: ' " that he, deponent, verily and truly believes that the motion as above written, is worded in the same manner as when by him put to the voice of the said council: that to the best of his belief and recollection the above named defendant, J. B. Gauthier, was present at the said meeting at the time the said motion was so put by him and carried by the said council: that he never understood that there was any agreement entered into between the above named defendant, J. B. Gauthier, and the board of common school trustees of the said town, as to the payment of the said Gauthier for the said brick by the payment of his taxes by the said board, but on the contrary, at the meeting of the council as afore-said, the said Gauthier and one Joseph Miller requested the council to pay the said Gauthier for the said brick by allowing the taxes due from the said Gauthier to the said corporation, to be marked as paid by the collector in each

year until the sum that should be found due to the said Gauthier, with eight per cent. interest on the unpaid principal, should be fully paid and satisfied: that in accordance with such requisition, the motion above set forth was put to the said council, and duly carried as aforesaid: that the said council do not in any manner interfere with the collection of the school taxes for the said town, but the said collection is made by the board of common school trustees for the said town by an officer appointed for that purpose at their own meetings: that the taxes which by the above mentioned motion were to be allowed to the said Gauthier as paid, were the taxes collected for the general purposes of the town, and had nothing to do with, nor were they to be accounted for by the said board of common school trustees: that at the last meeting of the said council for the year 1868, it was not agreed as stated by one Thomas Woodbridge in his affidavit that the clerk should open an account with the said board, but on the contrary, that the clerk should open an account with the said defendant Gauthier, in respect to the payment for the said bricks mentioned in defendant's affidavit, by the remission of the town taxes from year to year, until the whole amount of his claim and interest as aforesaid should be fully paid and satisfied.

*Warmoll*, for the defendant, shewed cause, and contended that there was no contract by the defendant with the corporation, and that therefore the former could not be unseated, the case not coming within the 20-30 Vic. ch. 51, sec. 73. The contract referred to in the Act must be a binding contract, and this was only binding, if at all, between the defendant and the school trustees.

*Harrison*, Q. C., for the relator. The qualification of councillors appears by 29-30 Vic. ch. 51, sec. 70, and speaks of all such "as are not disqualified," &c. Sec. 75, says, "no person having by himself or his partners an interest in any contract with or on behalf of the corporation." It is not necessary to shew a contract binding on the corporation, or formal contract so as to subject



the corporation to a successful suit: *The Queen v. Francis*, 21 L. J. Q. B. 304; *Reg. ex rel. Moore v. Miller*, 11 U. C. R. 465-469; *Reg. ex rel. Davis v. Carruthers*, 1 Prac. Rep. 114; *Reg. ex rel. Rollo v. Beard*, 1 U. C. L. J. N. S. 126, for if there is no binding contract, it is more likely that a party would use his position to enforce a claim which he could not legally substantiate.

The amount mentioned may be small, but the principle involved is of high importance: *Reg. ex rel. Bland v. Figg*, 6 U. C. L. J. 44.

JOHN WILSON, J.—I do not think it necessary that a valid contract should be shewn binding on the corporation to disqualify the contractor from sitting as a councillor of such corporation. If there is no contract binding on the corporation, the danger is the greater of the party improperly using his position to his own advantage, and to the prejudice of the municipality. The policy of the law is, that no man shall be a member of a municipality who cannot give a disinterested vote on a matter of dispute that may arise. If his judgment is likely to be clouded by self-interest in a matter of contract, or quasi contract, he should not be a member of the council.

*Defendant unseated.*

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### PURCELL V. WELSH.

*Not guilty and justification may be pleaded together.*

In actions for assault the defendant will be allowed to plead not guilty and justification together.

[CHAMBERS, February 26, 1869].

DECLARATION in trespasss for assault. The defendant applied for leave to plead together pleas of not guilty and justification.

*Devlin* shewed cause, and cited *Goldburgh v. Leeson*, 2 U. C. L. J. 209, where leave to plead these pleas together was refused.

JOHN WILSON, J.—I find, on consulting some of my brother Judges, that the practice has been for years to allow these pleas. The order must go.

*Summons absolute.*

### COOPER V. WATSON.

*Declaration not founded on writ of summons—Setting aside.*

- Held*, 1. A declaration without a writ of summons to ground it is only an irregularity which may be waived.  
2. An affidavit to support an application to set aside such a declaration must shew that the writ of summons has not come to the defendant's knowledge.

[CHAMBERS, March 4, 1869.]

*Boswell*, on the 2nd March, obtained a summons to set aside a declaration on the ground that no writ of summons had been served on defendant whereon to ground it. He filed an affidavit of the defendant, stating that the declaration was served on the 17th February, but that no writ of summons had been served on him, and that he had not instructed any attorney to accept service for him.

*Harrison*, Q. C., for the plaintiff, shewed cause.—1. The affidavit is defective in not shewing that the writ had not come to defendant's knowledge.

2. A declaration without a writ of summons is only an irregularity which can be waived, and has in this case been waived by defendant's laches.

HAGARTY, C. J. C. P.—The defendant has waived the irregularity of the declaration by his laches, in not moving at an earlier period. The objection made to the affidavit is good.

*Summons discharged.*

QUEBEC BANK V. GRAY.

*Law Reform Act, 1868—Notice for jury.*

A defendant can under the Law Reform Act, sec. 18, give a notice for a jury with a pleading which joins issue on a replication taking issue on the defendant's plea.

[CHAMBERS, March 4, 1869.]

ACTION on promissory note. Special plea on equitable grounds. Issue taken thereon by plaintiff.

Rejoinder by defendant, who "joined issue," and gave notice for a jury, under sec. 18 of the Law Reform Act, 1868.

The plaintiff then obtained a summons to shew cause why the pleading, professing to be joinder of issue or *similiter*, filed by the defendant on the replication of the plaintiffs, should not be struck out, and the notice by the defendant for a trial by jury set aside, on the ground that the said joinder of issue, filed by the said defendant is superfluous and unnecessary, and contrary to the usual practice in this court, and such notice can only be given with defendant's last pleading, &c.

*Harrison*, Q. C., shewed cause, citing *Young v. Stockdale*, 5 U. C. R. 323.

*Leith* contra.

HAGARTY, C. J. C. P.—I think I must hold under the late act, that a defendant must be allowed an opportunity of demanding a jury, either with his last pleading, when such pleading takes issue, or under sec. 108 of C. L. P. Act, by taking issue on a replication or subsequent pleading of plaintiff. I foresee that a difficulty may arise in practice in so holding, but I must give effect to the late act, and I cannot agree that a defendant may require "the issues to be tried by a jury" before any issue is raised.

*Summons discharged.*

## ALLAN V. ANDREWS.

*Commission to examine witnesses.*

An order for the examination of witnesses out of the jurisdiction will not be made before issue joined, merely for the purpose of expediting proceedings.

[CHAMBERS, March 6, 8, 1869.]

*Scott*, for plaintiff, asked for an order for a commission to take the evidence of a person in the United States. He explained that the application was made before issue joined, to expedite the proceedings. He cited *Fynney v. Beasley*, 20 L. J., Q. B. 395, and *Brown v. Mollett*, 24 L. J. C. P. 213, and undertook, if order made, not to execute commission until issue should be joined, referring to *Mondel v. Steele*, 8 M. & W. 300.

*Osler* shewed cause. There is no sufficient reason why the general rule, that a commission will not be ordered until issue joined, should be departed from, and it makes no difference that the plaintiff undertakes not to execute it before issue joined.

GWYNNE, J.—In *Fynney v. Beasley*, 20 L. J. Q. B. 395, although it was decided that a Judge has power to issue a commission to examine witnesses before issue joined, it was also decided that it is only in cases of great necessity that this departure from the general rule will be permitted. *Wightman*, J., regarded that case as one of the greatest possible necessity, namely, that the witness was on the point of sailing in two days for Port Natal.

*Patterson*, J., says, "This decision must not be taken as an authority that parties may come as a matter of course for an order or commission to examine witnesses before issue is joined in the cause. I say this because there is always a desire to push cases a little further than they quite warrant. The general rule remains as before laid down. The particular circumstances of this case make it an exception."

In *Brown v. Mollett*, 24 L. J. C. P. 213, the plaintiff, who was a master of a ship, obtained an order for his own

examination upon an affidavit that he was about to leave the country on a voyage to Stettin, and that he would not be back in time for the trial.

In *Mondel v. Steele*, 8 M. & W. 300, the witnesses were the captain and apprentice aboard a ship about to sail for South Australia in the course of a few days.

In *Spalding v. Mure*, cited in 2 *Tidd's Prac.* 864, a commission to India was granted before issue joined.

Now here the plaintiff has chosen to lay his venue in a county where he thinks he cannot get a commission returned in time for the Assizes first happening there, unless it be issued at once, but he is willing that it shall not be executed before issue joined. The witness resides at Rochester, in the State of New York. The only object apparent is to expedite the plaintiff's proceedings, and no prejudice from delay even is suggested, the necessity for the expedition now may then be said to have arisen from plaintiff's own delay heretofore in not bringing his action sooner. If I should grant this application I fear that I should fall into the error referred to by Patterson, J., in *Fynney v. Beasley*, and that I should be furnishing a precedent that, if followed, would have the effect in all cases of repealing the general rule instead of relaxing it to meet a case of urgent necessity. It seems to me that it would be scarcely possible to push the authority of *Fynney v. Beasley* further than upon the strength of it to grant this application.

*Summons discharged.*

# DIAMOND V. GRAY ET AL.

*Change of venue—Preponderance of convenience and expense.*

A defendant, when applying to change the venue on the ground of the preponderance of convenience and expense, should suggest in his affidavits the number of witnesses the plaintiff is likely to call, and where they reside.

Cases on applications of this kind considered.

[CHAMBERS, March 6, 8, 1869].

The defendant obtained a summons to change the venue



from the county of Lennox and Addington to Prince Edward, on an affidavit which stated, amongst other things, that the action was brought for the conversion of plaintiff's goods: that the declaration had been served but no plea pleaded: that the cause of action, if any, arose in the County of Prince Edward and not elsewhere: that deponent had "reason to believe and does verily believe that at least ten witnesses will be called to support the defence in this action": that it would probably be very difficult to reach the County Town of Lennox and Addington on account of the breaking up of the ice, &c.: that the trial at the County Town of Lennox and Addington would be attended with very much greater expense than if had at the County Town of Prince Edward.

*Osler* shewed cause, referring to Ch. Arch. 12 ed., pp. 1352, 1353.

GWYNNE, J.—*De Rothschild v. Schilston*, 8 Ex. 503, decides, in accordance with a report made by a committee of Judges to whom the subject was referred, that the application to change the venue may be made either before or after issue joined, as may be most convenient, but if the application be made before issue joined, it is requisite that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shewn. He may, however, if he choose, rest his application that the cause of action accrued in the county to which he wishes to remove the case, but if he does he may be answered by any affidavit negating this fact, or shewing that the cause may be more conveniently tried in the county where the venue is laid. If the application is made after issue joined, the party applying must in his affidavits, in support of the application, shew that the issues may be more conveniently tried in the county to which it is proposed to change the venue. *Smith v. O'Brien*, 26 L. J. Exch. 30, is to the same effect. There, it is said, the general rule is to try the cause where the witnesses



reside; but to this rule, however numerous the witnesses may be, and however great the expense in procuring their attendance, there is an exception, if it can be made to appear that a fair trial cannot be had in the county to which it is sought to be changed: *Penhallow v. Mersey Harbor and Dock Co.*, 30 L. J. Ex. 272, 329.

When the ground of the application is the expense attending the trial in the county where the venue is laid, the preponderance of convenience must be very great. In *Thornhill v. Oastler*, 7 Scott 272, the rule was refused, although the defendant stated that, in order to establish a set off which he had pleaded, it would be necessary to unravel accounts of eighteen years' standing: that he had sixty witnesses to examine, all of whom resided in the county to which he sought to remove the case, and that the additional expenses of trying it where the venue was laid would be more than £2,000, which he was wholly unable to bear. Tindal, J., here says, "The plaintiffs right in a transitory action to lay the venue where he pleases is undoubted; and before we deprive him of it we must be clearly satisfied that justice cannot be done between the parties unless we do so." From *Johnson v. Berisford*, 2 C. & M. 222, it would seem to be necessary to shew that the defendant has a defence; and from *Helliwell v. Hobson*, 3 C. B. N. S. 761, it would seem, unless the case is imperfectly reported, that the defendant applying to change the venue upon ground of convenience must shew that the convenience greatly preponderates in his favor, and that for that purpose he should give some evidence of the number of the plaintiff's witnesses, so as to shew the probable expense to him, for in that case the rule was refused, although the defendant swore that the additional expense of his own witnesses, if the trial should take place in the county where the venue was laid, would be £80 more than in the county to which he wished to change it, and although there were no affidavits by plaintiff shewing the number of his witnesses. Crowder, J., says "the plaintiff had a right to lay his venue where he chose, and it is not shewn what witnesses he may have. I therefore do not think

the defendants have made out any case to entitle them to a rule. It should at least *be made to appear* that the convenience greatly preponderates in defendants' favor." In *Durie v. Hopwood*, 7 C. B. N. S. 835, Willis J., however, referring to *Helliwell v. Hobson* says, "that if the point there decided should arise again that case might require some consideration."

A preponderance of convenience greatly in favor of a defendant can scarcely *be made to appear* unless the cost and convenience to the plaintiff is taken into consideration, and if he abstains from producing any affidavit how can it be said to be made to appear? It would seem therefore that in order to institute some comparison it is incumbent upon a defendant to suggest at least what number of witnesses the plaintiff is likely to have to call, and where they reside; and this is done in some of the cases reported, while in others there is an averment that the general cost of trial at the one place would be much greater than at the other.

In the case before me there is an affidavit filed both on behalf of the defendant and the plaintiff; and, forming what opinion I can upon them, the balance of convenience appears to me to preponderate in favor of letting the venue remain where it is, which appears more convenient, taking into consideration the convenience of all parties. The summons will therefore be discharged, costs to be plaintiff's costs in the cause.

*Order accordingly.*

### LOWE V. MORRICE.

*Costs—Consent to verdict—Rule silent as to costs.*

Verdict for defendant.—Rule for new trial unless defendant should consent to verdict for plaintiff for nominal damages, no reference being made as to costs. The defendant consented and plaintiff asked for costs of the rule. *Held*, that the plaintiff was entitled to the costs of the application for new trial and the rule granted thereon.

[CHAMBERS, March 9, 1869.]

THIS was an action on a bond, three breaches being assign-

ed. The plaintiff recovered on the first breach, defendant on the second and third. The plaintiff moved in Term for a new trial because of misdirection as to the second and third breaches. The court said the rule would be made absolute, unless the defendant, who had in fact paid the claims under these two last breaches, but who was not in strict law entitled to get the benefit of the payment by plea, should consent to a verdict being entered on these breaches for the plaintiff with nominal damages. The defendant consented to this, and the rule was drawn up accordingly.

The Master declined to allow to the plaintiff the costs of the application in Term and the rule finally granted thereon.

Against this decision of the Master the plaintiff appealed, and a summons was taken out to revise the taxation by allowing to the plaintiff the costs of moving the rule *nisi* for a new trial, of the argument thereof and of the rule absolute granted to enter a verdict for him in this cause, or such of the costs of said proceedings as the presiding judge should think fit.

*Harrison*, Q. C., shewed cause, citing *Marshall* on Costs, 153; *Wilson v. L. & Y. R. C. Co.*, 9 C. B. N. S. 632; *Patterson v. Corporation of Grey*, 18 U. C. R. 189.

*Jno. B. Read* contra, cited *Robertson v. Liddell*, 10 East, 416; *Jackson v. Hallam*, 2 B. & Al. 317; *Delisser v. Towne*, 1 Q. B. 333; *Stewart v. Matthieson*, 10 U. C. L. J. 245.

ADAM WILSON, J.—I entertained on the argument, before the cases were cited, a strong opinion against the application. The authorities referred to for the plaintiff shew that in such a case the consent given in Term that the verdict should be entered for the plaintiff should be considered as having been given at the trial; and the plaintiff having succeeded should get the costs of the rule.

Perhaps the better way of putting it is, that the consent of Term has put an end to the cause; the result is that the defendant has failed; the plaintiff has succeeded in the cause, and therefore gets the costs of the cause, and the costs of the

application in Term are part of the costs of the cause, for by and through such proceedings the cause has been successfully terminated for the plaintiff.

This is a matter of practice, which, when once settled, should be followed, and it is I think settled by the decisions before mentioned. It is not an unreasonable view to take as between the parties, for the defendant has confessed himself entirely in the wrong. Such is not the conclusion at which I should have arrived without the precedents already mentioned.

The order will therefore be granted for a revision, but without costs.

*Order accordingly.*

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### IN RE RUMBLE V. WILSON.

*Contract or tort—Jurisdiction of Division Court.*

A plaint in a Division Court charging that the defendant hired of plaintiff a horse, &c., to go from A. to B. and back, and agreed to take good care of same as a bailee, with an averment that the defendant so carelessly, &c., drove said horse, &c., that horse was killed, &c., is a plaint in contract and not in tort.

[CHAMBERS, March 10, 1869.]

A summons was issued on 29th January last, to shew cause why a writ of prohibition should not be issued to remove a plaint and proceedings from a Division Court after judgment pronounced.

The statement of the cause of action was as follows :

“For that the defendant hired of plaintiff a horse, harness, and buggy, in October, 1868, to go from Maple Village to Pine Grove and back, and undertook and agreed to take good care of the same as a bailee, and the plaintiff alleges that the law required him so to do, and to return the said property in safety to him again. And the plaintiff further states that the said Albert Wilson so carelessly drove and used the said property that the said horse, harness, and buggy, were not returned in safety to him, nor were the

same used with care, but on the contrary with negligence and carelessness, in consequence of which the horse was killed, the buggy was broken to pieces, and the harness broken, whereby further the plaintiff saith he hath suffered damage to the amount of \$85." The cause was tried before a jury who found for the plaintiff.

It was said that a new trial was moved for, but refused, and that this was the second action that had been brought, the plaintiff having been non-suited in the first because he happened unavoidably not to be present; and that no question of want of jurisdiction was ever raised.

*J. A. Boyd* shewed cause, and contended that the plaint was not in tort, but in contract: *Mayor of London v. Cox*, L. R. 2 E. & I. App. p. 280; *Morris v. Cameron*, 12 C. P. 422; *Jennings v. Rundall*, 8 T. R. 335; *Jones on Bailments*, pp. 66 to 68; *Story on Bailments*, 411; *Lloyd's C. C. Prac.* 221; *Noys' Maxims* (Bythewood's ed. 791.) If the objection had been taken at the trial the particulars could have been amended.

*F. Wright* in support of the application argued that the Division Courts Act recognizes the distinction between contracts and torts, and that the question was whether the action was maintainable without reference to any contract, and is founded on contract though framed in tort: *Bullen & Leake*, 102, notes 2nd ed.: 121 3rd ed., citing *Pozzi v. Shipton*, 8 A. & E. 963; *Marshall v. York, &c. R. W. Co.*, 11 C. B. 655; *Tattan v. G. W. R. Co.*, 2 E. & E. 844; *Legge v. Tucker*, 1 H. & N. 500; *Ansell v. Waterhouse*, 6 M. & S. 385; and in such a case the Judge should look at the actual facts as well as at the plaint and particulars: *In re Miron v. McCabe*, 4 Prac. Rep. 171, 175.

A. WILSON, J.—In *Jennings v. Rundall* it was decided that a cause of action founded on contract cannot be declared on as a tort so as to exclude the plea of infancy; that to such a tort infancy may be pleaded, because it is founded on contract. In that case the defendant was charged with immoderately driving the plaintiff's horse, by means of which



it was injured. The count was, "that the plaintiff on, &c., at the request of the defendant, delivered to the defendant a certain horse of the plaintiffs, to be moderately ridden, yet defendant contriving and maliciously intending, &c., wrongfully and injuriously rode the horse, &c."

The authorities to which I have been referred shew that the plaintiff could not have proved his case without first of all proving a contract for the particular act of hiring. In this respect an action against a common carrier differs from ordinary bailments, for against the common carrier there is a special customary common law obligation, which renders him liable upon his duty independently of contract altogether.

In this case, suppose there had been two persons who had hired the horse, and only one had been sued, could he not have pleaded the non-joinder of the other? I think he could.

The plaint or particulars here shew that the defendant "undertook and agreed to take good care, &c.," which is certainly a contract: *Chitty* on Pleading, 6th ed., 87.

The fact that the defendant got a non-suit on this same complaint, which he could not properly have got if the court had no jurisdiction, and the fact that he moved for a new trial—which he could not have got either—shew, as the fact is alleged, that the defendant never set up the want of jurisdiction, and therefore that no want of jurisdiction ever appeared by the evidence, and none, I think, appears on the face of the proceedings, but the contrary.

I have delayed this in consequence of the pressure of term business, and not from any difficulty in coming to a conclusion, for the opinion I express now is the same as that which I stated during the argument.

*Summons discharged with costs.*

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## REG. EX REL. CORBETT V. JULL.

*Municipal election—Improper conduct of returning officer—Election by acclamation.*

At a meeting called to receive nominations for municipal councillors, one party, as they alleged, made their nominations at 12 o'clock, or a few moments after, in the presence of only two or three persons, and without any effort on the part of the returning officer to call in the people outside the place of meeting. The returning officer did not enter the names of the candidates in his book, and gave evasive answers to some of the other party who came in afterwards, as to whether any nominations had been made or not, and led some of the electors present to think that there was an hour or so to make nominations, when in fact there was less than half that time. At 1 o'clock the returning officer, without making any preliminary statement that certain persons had been nominated, and without asking whether there were any other candidates to be nominated, declared that the persons nominated at the opening of the meeting were duly elected by acclamation. The other side, who were waiting, as they alleged, to make their nominations after the other party, under the impression that no nominations had as yet been made, protested against this; and desired to nominate the opposition candidates, (of whom the relator was one,) which the returning officer, however, refused to receive as being to late.

- Held*, 1. That the election must be set aside, and a new election ordered
2. That the relator was a candidate and voter within the meaning of sec. 103 of the Municipal act, although he had not been nominated or voted, for the returning officer could not by his illegal acts divest him of his rights in that respect.
  3. That the names of the candidates should have been submitted to the meeting *seriatim* after the hour had elapsed, and an opportunity given to the electors present to express their assent or dissent, without which there could not be said to have been an election by acclamation.
  4. That the returning officer had acted improperly and contrary to the spirit of the law, and was therefore ordered to pay the costs.

[CHAMBERS, February 26th, March 8th, 1869.]

This was a *quo warranto* summons on the relation of John Corbett against Thomas Jull, as reeve of the village of Orangeville, and John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, councillors of the same village, to have their elections respectively declared invalid and void, for the following causes :

1. That the said election was not conducted according to law, in this, that the said Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, or any or either of them, were not duly proposed and seconded according to law, nor were the said parties duly proposed and seconded at the place appointed by the returning officer,

nor were the said parties proposed and seconded within the time required by law.

2. That the said Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, were not duly or legally elected or returned in this, that the said parties were not duly proposed within the proper time or at the proper place, nor were they proposed according to law.

3. That the returning officer did not wait for one hour after the last candidate had been duly proposed and seconded as is required by law, but improperly and illegally declared the said parties duly elected councillors for the year 1869.

4. That the returning officer acted unjustly and illegally in conducting the said election, in this, that he told several intending candidates and electors that he had an hour to come and go on—meaning thereby, that it would be an hour before he closed the proceedings, and about fifteen minutes afterwards declared the defendants duly elected reeve and councillors respectively.

5. That the returning officer conducted the said election unjustly and illegally.

6. That the proceedings made necessary by law to the validity of said election were not observed by the returning officer at said election, to the prejudice of the electors of the village of Orangeville.

The relator claimed an interest in the election as a candidate for the office of councillor, and as a voter in having tendered his vote at said election for both reeve and councillors.

The defendant, Peter McNabb, disclaimed on the 28th January, 1869.

The returning officer was made a party to the cause and answered with the other defendants.

A number of affidavits were filed on both sides, but the further facts will be sufficiently understood from the judgment.

*McMichael* for the defendants shewed cause.

1. This is not a case within the act. The relator is not a candidate, as he was not nominated ; and is not an elector, as he did not vote or tender his vote : sec. 130, Municipal Act ; *Reg. ex rel. White v. Roach*, 18 U. C. R. 226 ; *In re Kelly v. Macarow*, 14 C. P. 457 ; *Reg. ex rel. Bugg v. Bell*, 4 U. C. L. J. N. S. 93. There may be a remedy at common law by the full court, but not under these proceedings. It was the fault of the relator and his friends that they did not make any nominations they chose, and they cannot now complain that they did not do so.

*Harrison, Q.C.*, for the relator. The new procedure is in place of the common law remedy : see *White v. Roachante* ; and this proceeding is not touched by the cases cited, which speak of electors not taking the trouble to propose candidates, and evincing a carelessness as to their interests. But here the relator's party were *waiting* and ready to make their nominations, but were deceived by the returning officer as to the position of affairs. If a returning officer can act thus, he can in effect abrogate the statute and destroy the rights of electors.

JOHN WILSON, J.—The preliminary and first question is whether under the circumstances disclosed the relator was entitled to his seat under our statute, and secondly, whether there was such an election in fact as can be sustained.

The clerk of the municipality of Orangeville is Francis Grant Dunbar. He is the clerk of Joseph Pattullo, attorney-at-law, one of these defendants. On the 3rd December, 1868, Mr. Dunbar, as clerk of the corporation, published the usual notice, that a public meeting of the electors of the village of Orangeville would be held at Bell's Hall, the place where the then last election had been held, on Monday the 21st of December, 1868, at the hour of 12 o'clock noon, for the purpose of nominating a reeve and councillors for the said village.

It is stated by a number of deponents, and not denied by any of the defendants, that a contested election was antici-



pated, and the village had been canvassed with a view to an election. There are, as is usual, contradictory statements as to what occurred during the hours between the opening and close of the proceedings, and as to when the proceedings were opened and closed, but I think there is no fair ground for saying, that the proceedings commenced after, but sharply after, 12 o'clock noon. Without discussing every controverted point in these proceedings, I shall be able to dispose of both points chiefly from the statements of the returning officer, and one of the affidavits in reply. The returning officer on oath says, "before leaving the office of Mr. Pattullo (for the purpose of holding the nomination), I borrowed Mr. Pattullo's watch for the occasion. At a few minutes before twelve o'clock, noon, I left the law office of Joseph Pattullo, Esquire, and went to the hall named in the proclamation, and shortly after entering said hall, I looked at my watch, and waited until 12 o'clock, when rising on my feet I formally opened the nomination by announcing to those then present that it was now 12 o'clock, and that I was prepared to receive nominations for reeve and councillors for the ensuing year, and that if no more than the necessary number of candidates for the several offices were nominated within an hour after the last nomination, I would close the nomination and declare those nominated duly elected by acclamation."

I may here refer to a fact, on which the returning officer offers no explanation. He had a book, but I hear of no entries in it of nominations. He was sitting, according to the sworn statement of McCarthy, between 12 and 1 o'clock, with a book before him, open, but blank; being left blank, the relator contends, that the electors might be misled by the concealment, which he was practising upon them.

I now read the returning officer's further account of his own proceedings on oath. "I then took my seat at the table, and George Bell, a duly qualified elector ascended the witness box and nominated Thomas Jull for the office of reeve, which was seconded by Thomas Hunter. Bell then nomi-



nated Mr. John Anderson as councillor, and the said Hunter seconded the nomination. James Ferguson, another qualified elector, then nominated Thomas Jackson as councillor, seconded by Hunter; said Hunter then nominated Joseph Pattullo, seconded by Thomas Jackson; Thomas Jackson then nominated Peter McNabb, seconded by James Ferguson—all of which were made publicly, openly and audibly, and as required by law, after and at the hour of 12 o'clock: that no other nomination or nominations for the offices of reeve and councilors was made within the hour, and I declared Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, duly elected reeve and councillors respectively for the village of Orangeville for the year 1869."

He says "I never spoke to any of said candidates or any other person or persons about the nominations before entering the hall," and he denies any conspiracy or arrangement to keep the nominations quiet and secret until the lapse of an hour, and that he received the nominations in good faith, and that the election was conducted strictly within the law so far as he was able to understand it. He says, "I neither omitted nor exceeded any part of my duty as returning officer, and the said nominations and election were fairly and impartially conducted, and any person had ample time and opportunity, and the full allowance made by law to do so: that I was ready and willing to receive nominations from the time I opened the nomination until the declaration, and I did receive all that were offered, and if any intending candidate was not nominated he was himself to blame for not procuring his nomination within the time required by law."

The relator by his affidavits charges upon the defendants, that they conspired to carry the election by means of opening the proceedings before 12 o'clock, and making their nominations when none of the electors excepting those necessary to make the nominations were present, and by concealing from the electors and other candidates that nominations had been made; and that this was done while the new candidates were waiting for the nomination of the old ones, as they

supposed, that they might then make their nominations : that the returning officer by evasive and false answers to questions as to the state of proceeding, kept them off their guard for an hour, and then suddenly declared the defendants duly elected by acclamation, without giving the electors an opportunity of nominating their candidates, and when they instantly rose to remonstrate and make them, he refused to hear them.

Maitland McCarthy says "I am a duly qualified elector of the village of Orangeville, and as such went to Bell's Hall for the purpose of nominating candidates for reeve and councillors for the municipality of the said village ; that I arrived there about twenty-five minutes after 12, noon, that on entering the hall I met the returning officer and Thomas Jull, who was afterwards declared reeve, in conversation close by the door of the hall. Jull soon after left the hall and the returning officer returned to his seat. I went to the returning officer's table and looked at the paper before him, and seeing it blank, asked him if he had received any nomination yet, to which he replied, 'I have not received any.' No nominations were made after I got to the hall. About fifteen minutes to one, Thomas Jackson came into the hall, and shortly after the returning officer left his seat and went to Jackson who was then close to me, and in my hearing asked Jackson, "are they not coming down?" remarking, "it is time," upon which Jackson left the hall, and about one o'clock, or a little after, Jull, Anderson, Pattullo and some others entered, and almost immediately after the returning officer stood up and declared Jull duly elected reeve, and Anderson, Jackson, McNabb and Pattullo, councillors. I protested as strongly as possible against the extraordinary conduct of the returning officer, after being informed by him not half-an-hour before that he had received no nominations, and I then nominated a person as a candidate for councillor, which was duly seconded, but the returning officer refused most positively to accept such nomination or any other, although several were made, stating he did not care for the electors or the council. That on leaving the hall, I met

Jackson who had just been declared elected ; I told him if he wished to wash his hands of such a corrupt work, he had better go back and repudiate all connexion with it, and decline to accept office in such a way. Jackson replied, that he had nothing to do with it, and he did not know anything of it, and had told them he would much sooner remain at home."

Various other affidavits were filed on both sides, but they did not materially alter the complexion of the case.

The conducting of an election is analogous to any public meeting where the object sought is a fair expression of opinion on any question proposed. A resolution is said to be carried by acclamation, when, after it has been proposed and heard, it receives no opposition, but is carried by the consent of the meeting, expressed or implied from its silence, but in no case can it be correctly said to pass by acclamation where it has not been proposed or not understood.

The law in regard to elections assumes, that when the election of any officer is carried by acclamation, the electors are fully and fairly informed of what they are assenting to by acclamation. They cannot assent to what is not submitted to their choice or present in their minds. A nomination is a resolution submitted to the electors, that the party named is a candidate for their suffrage for an office named, but the legislature to prevent surprise requires that not less than one hour shall elapse between the submission of the last nomination and the putting of the question with a view to its being passed by acclamation. In the mean time the vote is in abeyance. The statute does not mean that the returning officer, if no other nominations are made, shall simply declare those who had been proposed duly elected, it means that these nominations shall be put *seriatim* to the electors and then votes taken upon them. The law prescribes no form of words, but it requires that the proposition should be explained so as to be understood by men of ordinary understanding. Now this election is said to have been carried by acclamation. When was the acclamation ? Was it when the movers and seconders were present, and

perhaps one or two more, when the nomination was first submitted? Certainly not. Was it when the declaration was made? Certainly not, for no one heard then who had been nominated, nor was it at any other time submitted to the electors as a question to vote upon—no opportunity was given to say or not to say, if it was carried or not carried. They had then no knowledge of *what* was carried by acclamation. Did the electors generally know that the simple declaration of the returning officer was to imply their consent and bind them to the election? Certainly not, for some of them indignantly protested against its injustice, and commenced to make other nominations. When the hour had expired, it would have been proper for the returning officer to have called the attention of the electors then present to the fact of the expiration of the time, and to have announced that Thomas Jull had been nominated at twelve o'clock, or soon after, as the fact was, by George Bell as reeve, seconded by Thomas Hunter, and that if no other nomination was made, he should assume him to be elected by acclamation, and declare him elected accordingly. If, after a reasonable pause no other nomination was made, the declaration of his election should have been announced. And so with the other nominations *seriatim*. They ought not to have been submitted together, for it would thus become a compound question and embarrass the electors.

By requiring an hour to elapse between the nomination and the proceeding to close the election, in case of no further nominations, the legislature meant to protect the electors against haste and surprise, and in no case does the law require so strict an adherence to its letter as to defeat its object and spirit.

It is the duty of a returning officer to stand indifferent between contending parties; to have no interests to serve for either, or for himself; to approach his duty with the simple desire to do strict justice, to be ready and willing to give reasonable information as to the state of his proceedings, to conceal nothing, to evade no proper enquiry, to mislead no one by his silence, or exhibit anything calculated to deceive;



and he ought not to make a pretence of strictly following the letter of the law to defeat it.

Leaving out of the question all disputed facts, and taking the returning officer's own account of his proceedings, and acquiting him and defendants of any conspiracy or pre-arrangement to preclude the other party, and carry the election as it was carried, (and I think they are all entitled to their full acquittal on that score), did the returning officer honestly and fairly do his duty? Was it fair to have opened the proceedings until it was beyond question whether it was really twelve o'clock? Was it fair to open the proceedings in presence of two or at most three electors, and make no effort to let it be known outside that he was about to open his proceedings? Why were not his proceedings entered in his book as a deliberate act and as his duty required? His attention was called to the impression which his apparent blank book created, by several of the deponents. He passes this unnoticed, and I may fairly assume there was no entry made at the time. He took the trouble to tell Mr. Jull when he came in, that he, at least, had been nominated. Why did he not tell some of the other party? Why speak to Mr. Jackson and say to him what he does not deny he did say? Why so much anxiety about his watch and the time? Why, when asked by Kelly if any nominations had been made, did he answer, "Yes, lots of them?" Why not say who had been nominated, and why did he give an answer that at least was evasive? He says he does not remember McCarthy asking him if any nominations had been made, nor does he believe he did so, but he remembers his asking, "Have proceedings commenced?" and his replying proceedings had commenced at twelve, and that he would close the nomination one hour from the last nomination. Why did he not deign to tell him what he told Mr. Jull, that he, Jull, had been nominated reeve at the opening of the proceedings?

He denies what one Fead asserts, but he says among other things what Fead said, that he had closed the nomination on his account. To this the returning officer says, "I observed



that it would teach him a lesson, meaning that if ever he offered himself as a candidate, he would cause himself to be nominated within the proper time." How was it his duty to teach by his proceeding a candidate or the electors a lesson? Does not this answer imply the character in which Fead stood as an intended candidate whom the returning officer had taught a lesson, by something he had done. Was it fair to make no announcement at any time as to how the proceedings stood until by his declaration he had precluded any further nominations? Can any one say that justice was done to the electors on this occasion? On reading all the affidavits and all the explanations, I confess I arrive at the conclusion, that the election was arrived at by conduct of the returning officer not in accordance with law and contrary to justice.

The defendants' contention was, that this was not a case to which our statute applied, that it was one under the statute of Anne, because they say, the relator was not a candidate or voter, within the meaning of sec. 103 of the Municipal Act. I think he was. The relator was known to be a candidate, was there to be proposed, was in fact proposed, although after the declaration by which the returning officer assumed to preclude him. It cannot be permitted that a returning officer shall by his own illegal act divest a relator of his *status* as a candidate, nor can the defendants who adopt that act, strip him of the character which gives him a right to maintain his *quo warranto* against them.

But the other defendants, with full knowledge of all he did, adopted his declaration as an election by acclamation, and, excepting McNab, who disclaimed, they took their seats.

I feel compelled to declare the election void, and I award the relator costs against the returning officer, and the defendants who have maintained their right to the seats.

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## DONELLY V. REID.

*Plea in abatement.*

*Quære*, whether the pendency of a prior action in a County Court can be pleaded in abatement to an action in a Superior Court; but the question was left to be decided on demurrer.

Where the only affidavit of verification of a plea in abatement was made by the attorney for the defendant (in both actions), an application to set aside the plea was refused.

Application for leave to reply and demur to a plea in abatement refused.

[CHAMBERS, March 6, 10, 1869.]

To an action for work and labour the defendant pleaded in abatement, that an action was pending in a County Court between the same parties for the same cause of action. This plea was verified by the affidavit of the attorney for the defendant in both actions, who swore "that the plea hereunto annexed is, I am informed, and do verily believe, true in substance and in fact."

The plaintiff obtained a summons calling on the defendant to shew cause why this plea should not be set aside and struck off the files upon the following grounds: 1st. That the pendency of an action in an inferior Court for the same cause of action cannot be pleaded in abatement. 2nd. That it appeared from the particulars of claim in this action that an amount is claimed beyond the jurisdiction of the County Court, and therefore the County Court action cannot be for the same cause of action. 3rd. That the affidavit of verification of said plea was insufficient in substance. 4th. That the affidavit of verification should have been made by the defendant and not by the attorney.

Cause was shewn, and it was contended for the defendant,

1. That the term "Inferior Court," so far as this objection is concerned, does not apply to our County Courts, which are courts of record: *Laughton v. Taylor*, 6 M & W. 695; *Grant v. Hamilton*, 3 C. P. 422.

2. Affidavits were filed contradicting the second ground.

3. That the affidavit of verification may be made by a third person: *Tinseley v. Foster*, Burr. 344; *Chitty's Arch.* 12th ed. 914.

At all events the plea had to be filed within four days, and there would not have been time to get affidavits from defendant, and it is not the practice to enlarge the time for pleading in abatement, such pleas not being favored: *Jennings v. Webb*, 1 T. R. 279.

*Harrison*, Q. C., *contra*, referred to 4 & 5 Anne, cap. 16, sec. 11; *Onslow v. Booth*, 2 Str. 705; *O'Loghlen v. McGarry*, 2 Leg. Rep. 110 referred to in Brunker's Digest, 1614; *Coleman v. Grady*, Smythe, 155; *Chit. Arch.* 12th ed. 915; *Grant v. Hamilton*, 3 C. P. 426.

GWYNNE, J.—Independently of *Grant v. Hamilton*, 3 C. P. 422, I would not, upon a motion to set aside a plea in abatement for irregularity, grant an order to set it aside upon the ground that the prior action is stated to be pending in a County Court, which, although an inferior court, is still a court of record. But in view of that case, although it is not the point decided, the opinion of Chief Justice Macaulay appears to be that it would not be a good objection on demurrer. If plaintiff desires to raise that question he must do so on demurrer.

As to the second point, that the plea is not supported by a sufficient affidavit; by the Stat. 4 & 5 Anne, c. 16, s. 11, it is enacted, that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, *or shew some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true*; and in 2 Saund. 210, in note, it is said, it is not necessary that the affidavit should be made by the party himself, if it be made by his attorney it is sufficient.

Now the defendant's counsel in this case, who is also his attorney in the action brought in the court below, undertakes to swear, from the information furnished to him as an attorney in both suits, that he verily believes the plea to be true in substance and in fact. It was contended before me that no one but the defendant himself could make the necessary affidavit. There is authority against this contention. No case was cited to show that assuming the attorney

could make the affidavit, the frame of the one made in this case was insufficient.

In *Pearce v. Davy*, 1 Lord Kenyon, 364, an action of trespass was brought for breaking and spoiling certain fishing nets of the plaintiff, by throwing a grapple against it. The defendant pleaded in abatement, because the nets were certain large nets fastened together, called a pilchard seine net, and the plaintiff had no property in them but jointly with sixteen others, naming them, who are still living, to wit, in A., in the County of Cornwall, and not joined with the plaintiff in the action. This plea was supported by two affidavits, the first made by one of the defendants, sworn after process served, but before declaration filed; and he swore that from the first setting up of the old pilchard seine, he had been, and still was, a proprietor of a thirty-second share therein, and the plaintiff of an eighth, and several other persons (not naming them) of different shares therein, some an eighth, others a sixteenth, &c.

The other was an affidavit of one Paslow, who swore he believed the above affidavit to be true, and that the nets therein mentioned were the same as were mentioned in the declaration, and that he believed the defendant was entitled to a thirty-second share therein.

A rule *nisi* was obtained to set aside the plea for defects in the affidavit: 1. That the first affidavit being before declaration could not be looked at, but if it could, it was defective in not identifying the nets to be the same; 2. In not mentioning by name who the other several part-owners were, which it was insisted must be done in order to give the plaintiff a better writ. 3. That the second affidavit was founded on belief only. The court set aside the plea, because it was not verified so as to give the plaintiff a better writ, by setting out the names of the part-owners, but it was agreed that there was enough to induce them to believe the truth of the plea.

This is the only case I have been able to find upon this point, whether or not a person, other than the defendant making the affidavit, must swear positively to the truth. A



defendant making the affidavit might properly perhaps be held to greater strictness than his attorney. In the absence of any more express authority, I do not feel disposed to say—where the defendant's attorney in both actions declares upon oath that he verily believes that the causes of action are the same, and in the absence of any affidavit on the part of the plaintiff—that probable matter to induce me to believe that the fact of the plea is true is not shewn. If it is clear that the necessary affidavit may be made by the attorney, information and belief is all he could well speak from. I do not think, therefore, I should set aside the plea on this ground. As to the other objections suggested to the plea, these are more proper to be considered on a demurrer, if the plaintiff thinks fit to demur, than upon a motion to set aside the plea.

As to the plaintiff's application, in case the plea should not be set aside, to be allowed to reply and demur, I shall not grant it; for if, which perhaps admits of doubt, I have authority to grant leave to demur and reply to a plea in abatement, I certainly shall not exercise it to cause a double trial of such a plea. The judgment in favour of a defendant on a demurrer to the plea would be that the writ should be quashed. To what end then should the truth be enquired into, which if also established for defendant, would lead to the same judgment; whereas if the plaintiff succeeds on demurrer the judgment is *respondeat ouster*. With such results to be attained before the merits are approached, I would not, though I could, authorize the two modes of trial. The order will be to discharge the summons with costs.

*Summons discharged with costs.*

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## IN RE DAVY.

*Costs—Taxation—One-sixth struck off.*

Where one item had been abandoned by an attorney after a summons taken out for the taxation for his bill, but before actual taxation, and one-sixth was afterwards struck off the whole bill, including such item :

*Held*, that the attorney was properly ordered to pay the costs of taxation.

[CHAMBERS, March 15, 1869.]

A summons was taken out to tax the costs of the defendant's attorney against his client, in a suit of *Ham v. Eliza Amey*, but before the taxation took place, the attorney abandoned an item of \$20 in his bill.

The effect of this abandonment was to reduce the bill by more than one-sixth, and the master in settling the costs of taxation, decided that the position of the attorney was no better than if the item had been merely struck off on taxation, and he charged the attorney with costs of taxation.

The attorney thereupon obtained a summons calling on the client to shew cause why the master should not be directed to review his taxation ; and why he should not be directed upon such review to disallow to the said Eliza Amey her costs of the said reference, and to tax to the said attorney his costs of the said reference, on the ground that the said master had not taxed off one-sixth of the amount of the said bill referred to him for taxation, after taking into account the amount abandoned thereupon by the said attorney ; or why the said order made in this matter for reference to taxation should not be amended, by inserting therein a direction to the master to take into his consideration, in determining by whom the costs of the said reference should be paid, the fact of the abandonment of the sum of twenty dollars from the said bill by the said attorney, and his offer to pay the said Eliza Amey her costs of the summons for taxation of the said bill ; and why the said Eliza Amey should not bring into court the original order, for the purpose of amending the same as aforesaid ; and why upon such

amendment being made therein, the said master should not be directed to reconsider his allocatur and his taxation of the costs of the reference, and disallow the said Eliza Amey the whole or any part of the costs of such reference, and allow to the attorney the whole or any part of his costs of the said reference, or otherwise alter his said allocatur as he might be advised, on grounds disclosed in affidavit and papers filed.

*Osler* shewed 'cause, citing Con. Stat. U. C. cap. 3, secs. 27, 28, 31; 1 *Ch. Arch. Pr.* (12 ed.) 124; *In re Davy*, 1 U. C. L. J. N. S. 213, and cases there referred to.

*Holmested*, for the attorney, *contra*, cited *Ecollier v. Dutour*, 1 Barnes' notes 128.

RICHARDS, C. J., discharged the summons with costs.

*Summons discharged with costs.*

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### McGREGOR v. SMALL.

*Examination of insolvent debtor—Effete order.*

An execution creditor cannot examine a judgment debtor on a stale order which has been partially acted upon.

[CHAMBERS, March, 15, 1869.]

On the 26th February, 1867, an order was made for the examination of the defendant touching his estate and effects before the deputy clerk of the Crown for the County of Frontenac. Upon this an appointment was a few days afterwards made, which was served on the defendant together with the order. An arrangement was subsequently made between the parties for the payment of the judgment debt by instalments, and though some of the debt was paid pursuant to such arrangement, the defendant made default in his promises of payment, and execution was issued for the balance due, the result of which was an interpleader issue

to test the the right of a claimant to the goods seized, which was still pending. On the 10th of March, 1869, the plaintiff obtained from the deputy clerk of the Crown, and served on the defendant, another appointment for the 12th of March, 1869, on the order of the 26th of February, 1867.

The defendant then obtained a summons to shew cause why the order of the 26th of February, 1867, and the last appointment thereunder, or the said appointment alone, should not be set aside, on the ground that the said order was *effete* and lapsed, a previous appointment having been made thereon, and that it had been waived by delay.

*Osler* shewed cause. The first appointment was never acted upon, and the proceedings were stayed at defendant's request and for his benefit, and he cannot be heard now to object to proceedings on this order. There is no time limited within which these orders can be acted upon.

*O'Brien*, contra. The order has been acted on and is *effete*. This attempted proceeding would, if successful, give the plaintiff a new order for the examination of the defendant, without giving the latter an opportunity of shewing cause why he should not be examined. The circumstances of the case may have so changed that a judge would not grant an order for examination. There is, in fact, an interpleader issue about to be tried, which may result in the payment of the debt, and the object sought to be gained by this examination, viz., to obtain evidence for the execution creditor in the interpleader suit, is not a legitimate object.

He cited *Jarvis v. Jones*, 4 Prac. R. 341.

RICHARDS, C. J.—The defendant cannot in my opinion be examined on an appointment under an order more than two years old, and which has been partially acted upon. This appointment must be set aside, but I give no costs.

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## HOLMES V. REEVE.

*Certiorari to remove case from Division Court.*

*Held*, 1. The mere fact that a judge of a Division Court has expressed an erroneous opinion in a case before him, is no ground for its removal by *certiorari*.

2. Where a defendant knows all the facts of a case before the day of trial, but, nevertheless, argues the case and obtains an opinion from the judge, the case should not be removed, and the fact that the judge is desirous that the case should be disposed of in the superior court, can make no difference.

[CHAMBERS, March 15, 1869.]

This was an action brought on a promissory note for sixty-eight dollars, made by the defendant, and was placed in suit in the third Division Court of the County of Huron, and the summons was served for the court to be held on 25th January, 1869.

The defendant obtained a summons for a writ of *certiorari* to remove the case from the said Division Court into the Court of Common Pleas, on the ground that difficult questions of law were likely to arise.

One of the affidavits upon which the summons for the *certiorari* was granted was made by Mr. Sinclair, attorney for the defendant, and was as follows: "That the said judge reserved his judgment on said evidence and the points raised, from the twenty-fifth day of January last until the sixth February, instant, and from then until the thirteenth day of February, instant, when I attended before him, and he expressed a desire to have a short time longer for consideration, and he suggested the eighteenth day of February, instant, as the day he would be prepared to give his judgment: that on said last mentioned day I attended before the said judge, and Mr. Elwood appeared for the plaintiff, when the judge of said Division Court expressed his opinion adversely to the defendant: that he did so with great hesitation, as he expressed it, on the ground that the decisions bearing on the point appeared contradictory: that I suggested to the said judge the propriety of delaying his delivery of judgment until I had an opportunity of apply-



ing for a *certiorari* to remove the case to one of the superior courts of law, the case being one of great importance to the defendant, and one involving some questions of law, which had not then come up for decision in any of the superior courts of law in the manner raised by the facts of this case: that the said learned judge remarked that he certainly thought it a fit case to be removed by *certiorari*, and would grant time to enable me to apply therefor, and postponed the delivery of judgment until the fourth day of March next, for the purpose of such application."

The plaintiff's attorney, in his affidavit filed on shewing cause, swore, "That on the return of the said summons (in the Division Court) the said John Reeve appeared, and also the said Richard Holmes: that James Shaw Sinclair, of the said town of Goderich, Esquire, appeared as counsel for the said John Reeve, and I, this deponent, appeared as counsel for the said Richard Holmes: that the said cause was duly called on for hearing on that day before Secker Brough, Esq., judge of the County Court of the County of Huron, who is also the judge of the said third Division Court: that after the said case had been thoroughly gone into, and after several witnesses were examined, both on behalf of the said Richard Holmes and the said John Reeve, and after a lengthy legal argument had taken place, and when the said judge had expressed his opinion that his judgment would be for the said Richard Holmes, and just as he was about to endorse his said judgment on the said summons, the said James Shaw Sinclair got up, and asked, and pressed on the said judge, that if he would not then enter his judgment, but would defer the same to some future day, he could produce to him authority to shew that in law he was entitled to his judgment: that the said judge in pursuance of the said request, adjourned the said cause until the sixth day of February: that on that day the said Mr. Sinclair, on behalf of the said John Reeve, and John Y. Elwood, of the said town of Goderich, barrister-at-law, my partner, on behalf of the said Richard Holmes, appeared before the said judge, and further argued the said case: that after hearing the said



argument, the said judge informed the said parties that he would be prepared to give his judgment on the thirteenth day of February: that on that day the said Sinclair and Elwood appeared before the said judge to hear his said judgment, but he, not being prepared to give it then, said he would give the same on the eighteenth day of February."

It also appeared from another affidavit, that on the 18th February, the learned judge said he was then prepared to deliver his judgment, and then proceeded to deliver and did deliver the same; and said that "in his opinion the plaintiff Richard Holmes was entitled to his judgment," and then proceeded to give and did give his grounds for said judgment, and reviewed the authorities cited to him on the said argument: that after the said judge had delivered his said judgment, Mr. Sinclair, on behalf of the said John Reeve, applied to and urged upon the said judge not to endorse his judgment on the back of the said summons, but to refrain from doing so until the fourth day of March, instant, as in the meantime he would apply for a writ of *certiorari* to remove the said plaint.

*Spencer* shewed cause, and contended that the application was made too late, the case having been considered by the judge of the court below, and that judgment was in effect given, though not formally entered: *Black v. Wesley*, 8 U. C. L. J. 277; *Gallagher v. Bathie*, 2 U. C. L. J. N. S. 73.

*John Patterson*, contra, contended that the judge had given no judgment, and had expressly postponed his decision to enable the *certiorari* to be applied for; he had merely expressed an opinion. He cited *Paterson v. Smith*, 14 C. P. 525.

RICHARDS, C. J.—On principle I do not think this case ought to be removed from the Division Court. If the case was one fit to be tried before the judge of that court, the mere fact that he may have formed and expressed an opinion which was erroneous, is no ground for taking the case into a superior court. The defendant knew all the

facts of the case before the day of trial, and if it was considered it ought to have been removed from the Division Court, steps should have been taken for that purpose before it was heard.

It seems to me to be an unseemly proceeding, that the defendant, after having argued the matter before the judge, and obtained his opinion, and having had the case adjourned for the purpose of furnishing new authorities, and, after consideration of these authorities, the judge had expressed an opinion, that the case should then be taken out of his jurisdiction by a *certiorari*. The fact that the judge himself may have been willing or even desirous to have the case disposed of in the superior court can make no difference. After he has taken on himself the burthen of disposing of the case, having heard the evidence and expressed his opinion, I do not think, as a general rule, a *certiorari* ought to issue. The cases of *Black v. Wesley*, 8 U. C. L. J. 277, and *Gallagher v. Bathie*, 2 U. C. L. J. N. S. 73, seem to me to lay down principles inconsistent with removing this case. The case of *Patterson v. Smith*, 14 C. P. 525, does not, I think, lay down any doctrine contrary to that of the other cases referred to, for although there had been an abortive attempt to have a trial, there was no verdict, and the court no doubt looked at that case in the same way as if no jury have been sworn at all.

I think the summons should be discharged on the grounds I have mentioned, but as the learned judge of the County Court delayed the entry of judgment to enable the defendant to make this application, it will be without costs. I arrive at this conclusion as to the costs more readily from the fact that one of the affidavits filed on behalf of the plaintiff states the belief of the deponent that the attorney for the defendant speculated on the chance of getting a decision in his favour, and, it being against him, he now makes this application. I do not see how this statement thus made was calculated to be of any service to the plaintiff; the way in which it is made is not likely to keep up kindly feelings between professional gentlemen practising in the same town. No particular

grounds seem to be referred to in the affidavit as justifying the belief expressed, though no doubt the person making the affidavit entertained such belief. If the facts stated in the affidavit justify the inference, it will generally be better to place that inference before the Court as a matter of argument and conclusion to be drawn from facts, rather than as a fact in the affidavit, which the deponent swears he believes.

*Summons discharged without costs.*

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### JOHNSTON v. ANGLIN.

*Arbitration—Enlarging time for making award.*

An arbitrator having failed, owing to the loss of the papers in the cause, in making his award within the time limited, a Judge extended the time under Con. Stat. U. C. cap. 22, sec. 172.

[CHAMBERS, February, 22, April 5, 1869.]

In this case a verdict was taken for the plaintiff subject to be increased or reduced or verdict entered for defendant, by the award of an arbitrator, to whom power was given to enlarge the time for making his award. The arbitrator within the extended time endorsed on the order of reference for making the award, heard all the evidence produced on both sides and the addresses of counsel, and took all the papers to make up his award. It further appeared from the affidavit of the arbitrator that before he was enabled to make his award, the papers connected with the said arbitration and filed with him by both parties were mislaid, and he said that it was owing to papers being thus mislaid that he did not make the award or extend the time for that purpose: that the papers having since been found he was then willing to make his award in the premises if the Court would extend the time so as to enable him to make the same.

The last enlargement of the time for making the award was until 1st May, 1867.

In February, 1869, the defendant obtained a summons calling on the plaintiff to shew cause why the time for making the award under the order of reference at *Nisi Prius* should not be enlarged for two years from the first day of May, 1867, the time for making an enlargement of said term having elapsed without such enlargement having been made.

The application was founded on the affidavits of the arbitrator and the defendant's attorney.

*Harrison*, Q. C., shewed cause, citing *Re Burdon*, 27 L. J. C. P. 250; 31 L. J. Rep. 164; *Doe d. Mays v. Cannell*, 22 L. J. Q. B. 321.

*O'Brien*, contra, referred to Con. Stat. U. C. cap. 22, sec. 172; *Russell* on Awards, 141 *et seq.*; *Leslie v. Richardson*, 6 C. B. 378.

MORRISON, J., made an order extending the time as asked in the summons.

### ATTORNEY GENERAL V. McLACHLIN.

*Information of intrusion—Subpœna ad res.—Setting aside proceedings.*

1. In an information of intrusion the proper process to bring the defendant into court is a writ of subpœna *ad respondendum* directed to the defendant.
2. This writ can be issued after the information is filed, and, in this country, without the information being entered; and a specific prayer for such process is not necessary.
3. Such writ may be tested as of term, though sued out in vacation; and need not be served fifteen days before the return.
4. The affidavit of service of the subpœna is properly entitled in styling the Attorney-General, "Informant."
5. If the subpœna is not obeyed a writ of attachment may be obtained *ex parte* against the body of the defendant, but, *semble*, the better practice is not to grant such a writ against the person unless a special affidavit be filed shewing a necessity therefor.
6. *Quære*, as to the right of a defendant in contempt for non-appearance, but not actually arrested, to move *quia timet* to set aside the process issued against him.
7. When an application is made to set aside or amend a writ or other proceeding, by reason of anything contained therein or omitted therefrom, such writ or other proceeding (or a copy of it), must be brought before the court; but if the application be to set it aside because obtained irregularly, then it is sufficient to shew the facts upon affidavit.
8. *Hood v. Cronkrite*, 4 Prac. R. 279, commented upon.

[PRACTICE COURT, Hilary Term, Easter Term, 1869.]

In Hilary Term last *Boyd* obtained a rule calling on the



Attorney General to shew cause why the rule granted herein directing the issue of a writ of attachment against the defendant, and the writ of attachment and all proceedings had thereon, and the writ of *subpœna ad respondendum*, the copy and service thereof, and the *præcipe* therefor, or some or one of them, should not be set aside, superseded and rescinded with costs, on the grounds, amongst others :

1. That the information filed was not duly entered in an information book, or otherwise dealt with according to the rules of Court in that behalf.

2. That the information does not pray for the issue of process herein.

3. That the process by writ of *subpœna ad respondendum* was irregular and erroneous.

4. That the proper form of process was not sued out.

5. That the process should have been directed to the sheriff and not to the defendant.

6. That the writ served is not shewn to have been properly endorsed with the name of the party issuing the same.

7. That the said writ was wrongly tested as if issued in term.

8. That sufficient time did not elapse between the issue and service and the return of the same, and the time for appearing had not elapsed.

9. That no affidavit was produced or read shewing that the defendant had made default in entering an appearance herein, and no evidence of that fact was before the Court when said rule was granted for an attachment to issue.

10. That the application for an attachment herein should not have been *ex parte*.

11. That it is improper process, as being against the defendant's person instead of his effects and lands.

12. That the said rule was granted on insufficient materials.

13. That the affidavit of service of the writ of *subpœna* is not properly intituled, the Attorney-General not being styled the plaintiff.



14. That the writ of *subpœna* was not served till the return day thereof.

And upon grounds disclosed in affidavits and papers filed, and upon the affidavit of service of *subpœna*, and the writ of *subpœna* read and filed on this motion.

*Becher*, Q. C., and *James Patterson*, shewed cause.

The affidavit filed shews that Mr. Becher wrote to Mr. Ellis, the defendants' attorney, who resides at St. Thomas, on the first or second of February, telling him he should appear in four days, and asking him to see Mr. Becher if he were at London, that they might agree upon an issue in the cause: that Mr. Ellis's clerk answered the letter to the effect that Mr. Ellis had gone to Toronto to see his law agents respecting the defence of the action: that on the fifth or sixth of February, Mr. Becher received the letter from Mr. Ellis, stating he had been instructed to defend, and he purposed appearing and pleading in due time, and that he believed he had the whole time to appear and plead.

There were some preliminary objections to the defendants' proceedings.

a. The defendant should have filed a copy of the rule for attachment before he could move to set it aside.

b. The materials on which the rule was obtained should have been filed also; *Hoby v. Pritchard*, 5 Dowl. 300; *Needham v. Bristowe*, 4 Sc. N. R. 773, 4 M. & G. 262.

c. The defendant not having appeared yet, he has no attorney, and all affidavits should be made by himself: *Hood v. Cronkrite*, 4 U. C. L. J. N. S. 282.

d. No copy of information has been filed on this application, and no exceptions to it can be taken.

If, however, the objections can be considered, then the process is sufficient; *Alton Wood's* case, 1 Co. 68; *Waltingham's* case, Plowd. 547; *Attorney General v. Stanley*, 9 U.C.R. 84. As to the *subpœna* not being the proper process, and as to its being directed to the defendant—this was right; *Arch. Cr. Prac.* (1844) 43-4; 1 *Gude's Cr. Prac.* 120; 1 *Tidd Prac.*, (9 ed.) 156-7. In *Man. Exch. Prac.* 198, a different mode of proceeding is shewn; but a sub-

poena though it be unnecessary is not wrong, for the Crown may give notice to the defendant before actually attaching him.

The name of party suing out process need not have been endorsed. The provision does not apply to Crown process; *Arch. Prac.*, introduction, page 47. An affidavit of no appearance having been entered was not necessary before suing out the subpoena, but such an affidavit was used. It was said the subpoena should have been *ex parte*, but the practice warrants the course pursued here: *Arch. Cr. Prac.* 45; *Gude's Cr. Prac.* 120. The subpoena should have been produced; it cannot be assumed it was against the person of the party.

Service of subpoena, after 3 p.m. on Saturday, before the return day, is sufficient, for service on the return day would have answered: *Gude's Cr. Prac.* 120.

*Boyd, contra.* It was not necessary to produce the attachment or a copy of it: *Shirley v. Jacobs*, 3 Dowl. 101; *In re Metropolitan Railway Co.* 17 W. R. 186; *Stokes v. Grissell*, 2 Com. Law Rep., [C. P. 1854] part 1, pp. 732-3. The court will take judicial notice of its own rule; and in case of a Judge's order it is sufficient to state its substance.

The order itself is in the office of the court, and the court can order it to be produced. The party can now file a copy of it, on motion to be renewed: *Pocock v. Pickering*, 16 Jur. 760. It is no objection that the facts are not sworn to by the party himself, for he cannot know them. The attorney for him may rightly act. The case referred to was an affidavit made by an attorney to change the venue before he appeared, and the principle is not applicable here. Mr. Ellis also has been treated as the attorney for defendant by the opposite side. The information was not entered in a book until after the process had issued from the office. The affidavit on the other side does not meet this; it merely says it was considered as entered when it was filed: *Bunbury*, 209. There is such a book here as an Information Book.

The information is fully before the court, for it was pro-

duced on the application; and if it be produced again at the argument it is sufficient,—it need not have been filed: *Tebbutt v. Ambler*, 7 Dowl. 674.

The prayer in *Man. Exch. Prac.* 179 is stated to be that due process may be awarded to make defendant answer the premises. See also *Ch. on Prerog.* 332.

The prayer here is "Wherefore the said Attorney General, for and on behalf of her Majesty, prayeth the consideration of the court here in the premises, and that the said W. M. may come here to answer to our said lady the Queen in the premises," which is like the prayer in equity: *Story's Eq. Plg.*, 7 ed. (1865) p. 44 and notes; *Smith's Chan. Prac.*, 3 ed. 153-4. Until process prayed for it cannot properly be issued.

The subpœna is the process in criminal proceedings, and is not the proper process in a civil action: 4 Inst. 110.

In this country there are some instances of a *capias* having issued, and one instance of a subpœna having issued. In *Man. Exch. Prac.* 198, the note refers to a subpœna as a proper process; but his references do not support his statement: see *Chitty Perog.* 333; *Com. Dig. Perog. D.* 73; *Hawk. P. C.* book 2, ch. 27 ss. 10, 11, 12.

In *Booth on Real Actions* the attachment is the same as a *capias*; but the *capias* is in the nature of a summons, and not to arrest.

In intrusion the process is a *venire*, in information in *rem* and in *personam* the process is by subpœna: *Man. Exch. Prac.* 175, 205-6. The Imperial Statute 51 Geo. III. referred to in *Pennell v. Kingston*, 1 Cr. & J. 548, does not extend to this country: see C. S. U. C. ch. 10. A *capias* may go on a special affidavit of danger: *Clutterbuck v. Wiseman*, 2 Cr. & J. 213; *Nicholson v. Bownass*, 3 Pr. 263-6; if a subpœna was proper it should have been endorsed: *Man. Exch. Pr.* 206 (note); *Wickham v. Mealing*, 2 Pr. 9; *Price v. Davis*, 1 Y. & J. 9; Imp. Stat. 5 Geo. II. ch. 27, sec. 4; *Lloyd v. Maurice*, 9 East, 528; *Barnes v. Tweedal*, 1 Sm. Ch. Prac. 3rd ed. 183. There was not sufficient time between the teste and return of the writ; there should

have been 15 days: 28 Eliz. ch. 15; 20 Vin. Abr. 47. The writ should have been tested when issued, and as of the time it issued: C. S. U. C. ch. 21, secs. 1, 2, 3. Time to appear had not elapsed when the rule was moved. Defendant had eight days in which to appear: 5 Geo. II. ch. 27. Rules of 1856, No. 117, require affidavits to be made when rule moved. This applies to crown proceedings.

The defendant should have notice of the alleged contempt before he is arrested, *Smith's Ch. Prac.* 3 ed. 181-2-3. The affidavits and papers are properly intituled, for the Attorney General may be said to be the informant or plaintiff.

ADAM WILSON, J.—The proceedings appear to be as follows:—The information lays the venue in the county of Middlesex, and it begins thus:—“Michaelmas Term, in the thirty-second year of her Majesty Queen Victoria, A. D., 1868. Be it remembered that the Honourable Sir John Alexander Macdonald, K. C. B., her Majesty's Attorney General for the Dominion of Canada, who prosecutes in this behalf for our Sovereign Lady the Queen, being present here in court on Saturday, the last day of Michaelmas Term, in the thirty-second year of her Majesty's reign and A. D. 1868, gives the court here to understand and be informed, that whereas a certain parcel or tract of land situate in the township of Delaware in the county of Middlesex, known as, &c., to wit, on the 1st of November, 1868, and long before and always afterwards in the hands and possession of our lady the Queen, for the use of the Oneida Nation of Indians, was, and of right ought to have been, and of right is or ought to be, in the hands and possession of our lady the Queen, as well by certain conveyances thereof as in right of her Crown, as in many deeds, records, rolls and remembrances on record in this province more fully appear. Nevertheless one William McLachlin, the laws not fearing, &c., entered, intruded, encroached, and made entry and ingress into the said lands, &c.

Therefore the said Attorney General, for and on behalf of her Majesty, prayeth the consideration of the court here in



the premises, and that the said William McLachlin may come here to answer to the said Lady the Queen in the premises."

It is marked filed by the Master on the 28th of January, 1869, and there is endorsed on it: "Required a subpoena to answer to the within, returnable the first day of Hilary Term next.—J. A. MACDONALD, Attorney General, per H. C. R. Becher.

The information was entered in the "Information Book" in the Master's office, but it is disputed whether this was done before or at the time of the issuing of the subpoena or not till after it. For the Crown it is sworn that the senior clerk in the Master's office informed the defendant "that the information filed herein was duly entered in the books for that purpose, in accordance with the usual practice."

For the defendant it is sworn that the deponent "found the information had not been entered in any book, but had been simply filed, and that upon the filing of the same process by way of subpoena *ad respondendum*, addressed to the defendant, had been issued thereupon." The subpoena is directed to the defendant, commanding him that laying aside all pretences and excuses, he be and appear at the Court of Queen's Bench, at Toronto, on Tuesday, the first day of Hilary Term next (being the first day of February next), to answer to us of and concerning such matters and things as shall then and there be objected against you on our behalf, and further, to do and receive all and singular such matters and things as our said court shall then and there consider of and concerning you on their behalf, and this you are not to omit under the penalty of £100, to be levied upon your goods and chattels, lands and tenements, if you shall make default in the premises.

Tested in the name of the Chief Justice, the 5th day of December, in the thirty-second year of her Majesty's reign, A. D., 1868.

Issued from the Crown Office at Toronto the 28th day of January, 1869.

(Signed) R. G. DALTON, C. C. & P.



This writ is endorsed :—

“Sir John Alexander Macdonald, K. C. B., Attorney General of our lady the Queen for the Dominion of Canada, prosecuteth this writ against the within named William McLachlin, upon an information exhibited against him by the said Attorney General in the Court of Queen’s Bench at Toronto, before the said court for certain trespasses, encroachments, and intrusions.

JOHN A. MACDONALD, Attorney General.”

This writ was personally served on the defendant at the township of Sutherland, in the county of Elgin, on the 30th of January, 1869, and the original was at the same time exhibited to him.

An affidavit was made and filed on the 6th of February, 1869, of search having been made in the Crown office at Toronto for an appearance by defendant, but that no appearance had been found entered, and on that day the Crown moved for and got a rule for a writ of attachment against the defendant, directed to the Sheriff of Elgin, for not appearing to the subpoena to answer an information filed.

The rule of attachment or copies have not been produced.

The attachment was moved for on an affidavit that the defendant had not appeared.

I have firstly to consider, whether the objector is himself proof against objections. Should he have filed the rule for attachment, and the proceedings upon which the rule was obtained, and the copy of information?

When the application is to set aside or amend a proceeding of any kind, for anything contained in it or alleged to be contained in it, or omitted from it or alleged to be omitted from it, that proceeding or a copy of it must be brought before the court or Judge to whom such application is made, or the substance of it in some cases as far as may be necessary must be stated and verified by affidavit, for the court or Judge must be informed what it is the party asks to have done, so as to be able to decide whether the application should be granted or not.

So if a proceeding be asked to be set aside because some

other proceeding on which it is founded was improperly or irregularly taken, the first proceeding or a copy of it must be produced on the application: *Sherry v. Oke*, 3 Dowl. 349: *Needham v. Bristowe*, 4 M. & G. 262: *Bennett v. Benham*, 33 L. J. C. P. 153: *Stokes v. Grissell*, 2 Com. Law Rep. part i., p. 732-3: *Cooper v. Foulkes*, 1 M. & G. 942; 9 Dowl. 46: *Hoby v. Pritchard*, 5 Dowl. 300: *Heath v. Nesbitt*, 11 M. & W. 669: *Pokock v. Pickering*, 18 Q. B. 789.

In some cases it can not be necessary to produce any proceedings, the statement of them being alone sufficient for the purpose, as if after a Judge's order to arrest for debt, and arrest made the debtor pay the debt and he applies to be discharged from custody—the question being whether the payment was made to an agent authorized to receive it, or to some person who was a partner of the plaintiff—it cannot be necessary to produce the affidavits on which the order to arrest was made, nor the order, nor the *capias*, for none of them are required in the adjudication; the sole question is whether upon a certain state of things alleged by affidavit to exist, and not in controversy, the defendant should be discharged from custody.

If the court or Judge should be quite satisfied that the payment was a good payment to or for the plaintiff, all the relief that was asked can be granted, though none of the proceedings in the cause are used on the application, for none of them are to be interfered with.

In this case the plaintiff objects to the defendant's proceedings, that the materials on which the rule for attachment was obtained were not filed on the application by defendant; but this is a mistake, for they were filed and used on the motion, as appears in the rule.

The plaintiff then objects that the defendant should have filed a copy of the rule for attachment before he could move to set it aside. The defendant applies to set it aside because it was obtained *ex parte*.

Upon this application the court knows by affidavit there was a rule for attachment, the court also knows by affidavit on the part of defendant that the rule was issued *ex parte*.

The rule, or a copy of it, if produced, would shew this to be so by the most perfect evidence, the document itself; but it is not whether the document is verified in the fullest manner, but whether it is sufficiently verified, and I think it is: *Shirley v. Jacobs*, 3 Dowl. 101.

If the objection had been whether the order contained or omitted something, the order or a copy of it must have been produced: *Sherry v. Oke*, 3 Dowl. 349; but it is simply that the rule was *ex parte* instead of *nisi*, and so it is the effect of and authority to make such a rule that are only in question, and not its contents or sufficiency which would require it to be perused. This objection fails.

The plaintiff next contended that the affidavit filed by Mr. Boyd, who describes himself as "barrister-at-law," and who states he was present at the motion for the rule for attachment, that he was "interested in the motion as agent for Henry Francis Ellis, the clerk or attorney for the said defendant."

The facts are such as shew on the face of the affidavit that the defendant himself could not have made the affidavit conveniently. It is also an affidavit chiefly verifying papers, which it appears to me any body could make. Nor do I think the plaintiff can object to Mr. Ellis being treated as representing the defendant, after communicating with him in this suit as the attorney, and claiming to bind the defendant by the answer which Mr. Ellis has written. The case of *Hood v. Cronkrite*, 4 U. C. L. J. N. S. 282, does not apply. See the case there referred to of *Biddell v. Smith*, 2 Dowl. 219, and the cases there referred to in the note.

The last objection by plaintiff was that the copy of information was not filed on this application. This is a mistake, for it is expressly mentioned in Mr. Boyd's affidavit, as a document filed herein.

To proceed then with the defendant's exceptions.

1. The information was not entered in any information book, or otherwise dealt with according to the rules of Court.

I do not know any practice in the Province requiring an information book to be kept and making it imperative to

enter the information therein before any process is issued upon the information. Such a book is referred to in *Com. Dig.* "Information," D 1, as required by the order of the court of Exchequer—and it is also referred to in *Bunbury*, 209, and *Man. Exch. Prac.* 205, note. In the last case the court refused to set aside the process.

No irregularity has been made out on this point to my satisfaction.

An entry was made in it of the filing of the information, though not perhaps in proper time, if it were necessary to enter it at all; but I should not be disposed to set aside proceedings for such a cause without the most direct authority.

2. That the information does not pray for the issue of process herein.

The information prays the consideration of the court in the premises, and that the defendant may come here to answer the premises.

The conclusion in *Man. Exch. Pr.* 197, and *Ch. Prerog.* 333, is that the attorney prays the consideration of the court in the premises—so far the same as the form here does, but it continues, "and that due process of law may be awarded against the defendant in this behalf to make him answer to our lord the King touching the premises."

The form in *Walsingham's* case, *Plowd.* 547, is the same precisely as in this case, that the Attorney of the Queen "prays the advice of the court in the premises, and that the said T. W. may come here to answer to the said lady the Queen in the premises."

In this instance there is no merit in the objection, and as it is of no consequence, I cannot be wrong in accepting the precedent as sufficient, when Lord Ellenborough, in *Wain v. Warlters*, 5 East, 10, said of *Plowden's Reports* that "better authority could not be cited." See also 1 Co. 26 b.

3. That the process by subpœna is irregular and erroneous.

In *Ch. Prerog.* 333, note *a*, it is said that in 6 *Com. Dig.* 65 tit. "Prerogative," D. 73, it is laid down that the process upon an information shall be a *venire distringas*, afterwards a writ out of Chancery directed to the treasurer



and barons, referring to 4 Inst. 110. In *Comyn*, however, it is added in the edition of 1822, later than *Ch. on Prerog.*, which was published in 1820, "whether this extends to process upon an information, *vide* 'Information' D. 1."

In this last place of reference it is said : On an information in B. R. or C. B. a subpœna lies: 3 *Leon.* 48; *Co. Entr.* 370, 1 *And.* 48. And so on an information in the Exchequer a subpœna lies, and afterwards an attachment, proclamation, commission of rebellion, &c.

In *Man. Exch. Prac.* 198, it is said : The old process on information of intrusion is a *venire distringas*, and afterwards a writ out of Chancery directed to the treasurer and barons—referring to the cases in the notes, which are as follows : "*Co. Entr.* 387. Against a peer the first process is said to be a *distringas* : 2 *Hawk. P. C.* 284, ch. 27, sec. 12. No reason is given why the goods of a peer should be taken without a previous default : 4 Inst. 110; and see writs of subpœna and attachment, *Co. Entr.* 376, 390; 1 *Brown's Entr.* 236; and further process thereon, *Co. Entr.* 372; 1 *Brown's Entr.* 237."

I entertain no doubt, on looking at these references and at those cited in the argument, that a subpœna may be sued out as notice to the defendant to appear and plead.

The fourth, fifth and sixth objections I also decide against.

As to the seventh objection—the teste of the writ—I find in the reference to *Gude's Crown Practice*, that the *subpœna* is issued by the court at Westminster, and although it does not expressly appear that it was tested in term, it is quite plain that it was so tested. There was no authority cited to shew that the writ was wrongly tested, and I am not satisfied that it is wrong.

The eighth objection is that sufficient time did not elapse between the service and return of the *subpœna*—and the time for appearing had not elapsed. The *subpœna* was issued on the 28th of January, and was served on the 30th of the same month—the return day being Monday, the 1st of February—and the motion was made for an attachment on the 6th of February.

In *Gude's Crown Practice* it is said that the *suppœna* issued



on a criminal information may be served on the return day of the writ.

It is the same as to a bill of Middlesex: *Oxlade v. Davidson*, 4 T. R. 610.

The rule was that original writs in England and all judicial writs founded on them must have had fifteen days between the teste and return, and must have been served fifteen days before the return; but this rule never applied in any case excepting when the suit was commenced by original writ. Now this information is not founded or supposed to be founded on any original writ out of Chancery, "it is grounded on no writ under seal, but merely on the intimation of the King's officer, the Attorney General, who gives the court to understand and be informed of the matter in question," 3 Bl. Com. 261.

The ninth ground is a mistake. It is sworn to the contrary, and the affidavit that was used shewing that no appearance was made is produced, and bears date as filed on the 6th of February, when the rule was moved.

The tenth objection is certainly frivolous, for in no case of the kind can the rule be other than *ex parte*.

The twelfth objection, that the rule was granted on insufficient materials, means, I suppose, that an affidavit of non-appearance being entered was not produced when the rule was moved; but this, as has been shewn, is a mistake; the materials were sufficient to authorize the issuing of the writ.

The thirteenth objection, that in the affidavit of the service of the writ of subpoena the Attorney General is not styled plaintiff, is not maintainable; he is called "informant," and he is so in fact; he is not absolutely the plaintiff; the defendant is called on "to answer *our lady the Queen* in the premises."

The fourteenth objection, even if it were true, is not a valid objection, for the subpoena might have been sued out, served and returned the same day: 4 T. R. 610.

This disposes of all the objections but the eleventh, which is, that it is improper to sue out an attachment against the defendant's person instead of his effects and lands,

In *Tidd's Prac.* 9th ed. 110, it is said that an attachment "is still the first and immediate proceeding upon the original in trespass *vi et armis*, &c., where the violence of the wrong requires a more speedy remedy." It was not, however, against the person of the debtor, but to be executed upon his goods, or upon him in some way to compel him to find pledges for his appearance.

In Crown process, however, the extent was against the body, lands and goods, and it was at the discretion of the court either to issue or extend favour on a *capias corpus* : *The King v. Plaw*, 3 Pr. 94.

We have here the anomalous proceeding of a defendant who will not enter an appearance, applying to the court to set aside a process which has been issued against him to compel him to appear, because he says he should not be arrested, though he has not been taken yet, or wronged in any way, although he is *primâ facie* in contempt by not appearing and still continues in contempt.

A person arrested improperly may, no doubt, complain of it, and he is not obliged to appear to the process, or to remove the contempt before he applies ; but here the defendant, who will not appear, comes into court and prays *quia timet* that process against him may be set aside, because he does not want to come into court.

It seems something like casting an essoin by the person himself bringing his own excuse into court for not appearing, which was never allowed.

I am rather inclined to think that such an application as this cannot be made under the circumstances. I do not, however, decide this objection on that ground. I think according to *Coke's Entries*, 372, 376, 390, and *Man. Exch. Prac.* 206, 215, that the attachment may go against the body of the defendant. I must confess, however, I do not think it should be allowed unless upon a special affidavit shewing its necessity, as that the party was about to leave, or had no goods to be distrained.

It seems a harsh process to be issued as of course, and in the first instance, even for not appearing to a Crown suit ; and I think provisions should be made for the practice

proper to be adopted in such cases. I do not think, however, the practice is irregular or unwarranted.

I regret this case has been so long before me, but from the time it was argued in Practice Court in Hilary Term (February) I have not had time to spare to consider it; and I am now obliged to take it up during the pressure of the Easter Term business.

It was not the difficulty of disposing of the case that occasioned the delay, but the necessity there was of taking some pains to examine the precedents and authorities referred to on the numerous exceptions which were taken.

I have felt it a very irksome task to labor through it, for it is not satisfactory to be compelled to give so much time to so many technicalities when there is so much real business to be done and so little time to devote to it.

I discharge the rule with costs. The appearance which was conditionally entered will now stand as an absolute appearance.

### WAKEFIELD ET AL. V. BRUCE.

*Writ of attachment—From what office to issue—Sufficiency of material for—  
Entitling affidavits for writ.*

A writ of attachment was issued by the Clerk of the Process at Toronto, upon a Judge's order, which was granted upon affidavits, entitled "In the Court of Common Pleas," and in the cause. The affidavits of the plaintiffs stated that the defendant was indebted to plaintiffs in the amount of certain promissory notes, which were described, shewing them to be overdue, and held by the plaintiffs, and that defendant had departed, &c., with intent to defraud the plaintiffs. The affidavits of two witnesses stated that the defendant had carried on business in Toronto, and that they believed he had departed, &c., with intent to defraud the plaintiffs.

*Held*, 1. The writ was properly issued by the Clerk of the Process, who should issue all original writs from the principal office, Toronto.

2. It is not necessary that the plaintiff should swear that the debtor was residing within Upper Canada, if that fact is sworn to by other persons.
3. It is sufficient to shew that the debtor intends to defraud the plaintiffs, without shewing an intention to defraud creditors generally.
4. The affidavits are not vitiated by being entitled before the issue of the writ.
5. If a defendant be held to bail for too large a sum, this can be amended.
6. The promissory notes, or the cause of action, being set out fully, the indebtedness of the defendant is alleged with sufficient certainty.

[CHAMBERS, April 1, 1869.]

A WRIT of attachment was issued against the defendant

as an absconding debtor from the office of the Clerk of the Process at Toronto, upon the order of Mr. Justice Morrison, founded on the following affidavits :

F. W. Coate, of the City of Toronto, one of the plaintiffs, stated as follows :—“That this action was brought by the above named plaintiffs against the above named defendant for the recovery of the amount of three several promissory notes made by the defendant, payable to and held by the plaintiffs, as follows :—1. A promissory note dated the seventh day of February last, for seventy-six dollars and ninety-six cents, payable on demand. 2. A promissory note for two hundred and thirty-four dollars and sixty-four cents, dated the seventh day of October last, payable four months after date. 3. A promissory note dated the sixteenth day of October last, for two hundred and seven dollars, payable four months after date : that on Friday last I learned that the defendant was about to quit Canada with intent to defraud the plaintiffs, as I verily believe, and I at once took proceedings to procure a writ of *capias* against the said defendant, which writ was issued on that day, and although efforts were made to effect service of the same, the plaintiffs were unable to have service of the same effected upon the defendant, who left Canada on Saturday last : that I, this deponent have good reason to believe, and verily do believe, that the said defendant hath departed from the Province of Ontario, formerly called Upper Canada, and gone to Detroit, in the State of Michigan, one of the United States of America, with intent to defraud the plaintiffs of their just dues, and to avoid being arrested under the said writ of *capias* ; that the said defendant at the time of his so departing was, and he still is, possessed to his own use and benefit of personal property, credits and effects in the City of Toronto, in the County of York, and in the County of Essex, within this Province : that after the said proceedings were so taken as aforesaid, and on the same day, two other promissory notes by the said defendant, payable to and held by the plaintiffs, became due and payable and were dishonored, and the said defen-



dant then became indebted to the said plaintiffs in the amount of such two further promissory notes as well as three promissory notes above described, which two further promissory notes may be described as follows:—1. A promissory note dated the second day of November last for two hundred and fifty-two dollars and twenty-eight cents, payable four months after date, made by the defendant. 2. A promissory note dated the second day of November last, for one hundred and eight dollars, payable four months after date, made by the defendant.”

James Bennett Baxter stated that he was well acquainted with the above named defendant, who had for two or three years past carried on business in the City of Toronto aforesaid; and that he had good reason to believe, and did verily believe, that the said defendant had departed from the province of Ontario, formerly called Upper Canada, with intent to defraud the plaintiffs, and to avoid being served with process or being arrested.

William Wakefield, the younger, stated that he was well acquainted with the above named defendant, who had for two or three years past carried on business in the City of Toronto: that he had good reason to believe and did believe the said defendant had departed from the Province of Ontario, formerly called Upper Canada, with intent to defraud the plaintiffs, and to avoid being served with process or arrested.

The defendant obtained a summons calling on the plaintiffs to shew cause why the writ of attachment and the concurrent writ of attachment issued herein, the copies and services thereof, the *fiat* or order therefor, and the *præcipe* therefor, and the seizure, and all proceedings had thereupon, thereunder or in respect thereof, or some or one of them, should not be set aside with costs on the following, among other grounds:—

1. That the said writ purports to be and was issued by the Clerk of the Process in the County of York instead of by the Clerk of the Crown and Pleas of this Court.

2. That the said order or fiat was granted and writ issued



upon insufficient materials, in this, that it is not shewn in and by the affidavits upon which said order or fiat was made that the defendant was a resident of Upper Canada or Ontario, or that he had the intention to defraud his creditors, other than the plaintiffs, in his alleged departure from Upper Canada.

3. That the affidavit of the plaintiff does not state the cause of action sufficiently, and does not swear that the defendant is indebted to any person or to the plaintiffs, or that the notes in the affidavit mentioned are due and unpaid, and does not describe the said notes with certainty.

4. That the affidavits of the two other persons, filed on obtaining such fiat, are uncertain in stating that the defendant departed from Upper Canada to avoid being served with process or being arrested.

5. That all said affidavits are defective and erroneous in being styled in this court and in this cause before the writ of attachment issued, and that the fiat is not entitled in any court or cause, and refers to James Bruce above named as "the defendant" when there was no cause pending, and does not direct the issue of a writ out of either of the superior courts.

6. That all said affidavits are defective and insufficient in referring to the above named James Bruce as "the defendant" when there was no cause pending, and they do not refer to him as "the debtor."

7. That the defendant is ordered to be held to bail for a larger sum than the amount sworn to, and the said erroneous sum is so stated in the said writ and is marked therein.

8. That the said affidavits do not state the grounds of the belief of the several deponents that the defendant had absconded or departed from Upper Canada with intent, &c., or to avoid being served with process or arrested.

9. And upon grounds disclosed in said affidavits and papers filed.

*Kerr* shewed cause, and referred to Con. Stat. U. C. cap. 25, secs. 2 and 5; and Con. Stat. U. C. cap. 22, Forms No. 1 and No. 2.

1. The same memorandum in margin of all the writs, although sec. 4, sub-secs. 1 and 2, provides for issue of latter writs by clerk of process. Clerk of process shall issue all original writs. Attachment contains a summons.

2. Affidavits shew that the defendant was a resident of Ontario—not necessary that the plaintiff should prove this, and the affidavits of the two other persons shew this. Plaintiff swears he had goods here and absconded. The judge was satisfied when he granted the order, and defendant should appeal: *Romberg v. Steenbock*, 1 Prac. Rep. 200; *Blumenthal v. Solomon*, 2 Prac. Rep. 51; *Ford v. Lusher*, 3 O. S. 428. It is not necessary to shew more than intention to defraud plaintiff: sec. 2. One creditor cannot learn whether there are other creditors—there may not be: sec. 1. If indebted to any person he is within the act. Similar affidavit is required under Con. Stat, U. C. cap. 24, sec. 5.

3. It is sworn that defendant is *indebted* to plaintiffs in the amount of the notes. The facts sworn to shew that the notes were overdue; and that they are *held* by the plaintiff, and the particulars of the notes are set out with certainty; *Brett v. Smith*, 1 Prac. Rep. 309; *Ross v. Hurd*, 1 Prac. Rep. 158; *Jones v. Gress*, 25 U. C. R. 594; *Racey v. Carman*, 3 U. C. L. J. 204.

4. The affidavits of Baxter and Wakefield follow the statute literally, and are sufficient.

5. Affidavits must be entitled in court and cause. There is no provision similar to that with respect to affidavits to hold to bail: *Hargreaves v. Hayes*, 5 E. & B. 272. The style of cause if improper will be rejected as surplusage: *Re Burrowes*, 18 C. P. 493.

6. The debtor is also called “defendant” in the act.

7. Bail is not for too much: there is a mistake in copy of affidavit, but if for too large a sum this can be amended: *McGuffin v. Cline*, 4 Prac. R. 134; *Cunliffe v. Maltasse*, 7 C. B. 695.

8. Statute does not require grounds of belief to be stated, but they are shewn sufficiently. The rule does not apply here as in *B. U. C. v. Spafford*, 2 O. S. 373.

*Boyd* supported the summons. As to the first ground, see form of writ given in the act, which overrules the C. L. P. Act, secs. 3, 4, Rule of Court, No. 150, but the statute prevails: *Williams v. Rider*, 1 Prac. R. 43. In *Leeson v. Higgins*, 4 Prac. R. 340, it was held that the Ejectment Act was to be construed independently; moreover, the rule is that the later act, if repugnant to an earlier act, is to prevail: *Gardiner v. Gardiner*, 2 O. S. 534, 574, 575; *Dow v. M. B. of Works*, 8 Jurist N. S. 1040.

2. Residence not sufficiently shewn: *Smith v. Niagara Co.*, 6 O.S. 555; *Higgins v. Brady*, 10 U. C. L. J. 268; *Bank of Montreal v. Baker*, 9 Grant 108.

3. Plaintiff's cause of action not sufficiently stated: *Anon*, 2 O. S. 292; *McKenzie v. Bussell*, 3 O. S. 343; *Edwards v. Dick*, 3 B. & Ald. 495; *Handly v. Franchi*, L. R. 2 Ex. 34.

4. Affidavits uncertain: *Quackenbush v. Snider*, 13 C. P. 196; *Higgins v. Brady*, 10 U. C. L. J. 268; Con. Stat. U. C., cap. 25, sec. 2.

5. As to entitling affidavits before writ: *Hollis v. Brandon*, 1 B. & P. 36; *Green v. Redshaw*, 1 B. & P. 227; *The King v. Cole*, 6 T. R. 640; *Clarke v. Cawthorne*, 7 T. R. 321; General Rules, 37 Geo. III. (1797), 7 T. R. 454. This is in force in Canada. Rule of Court, 1 M. T. 4 Geo. IV. No. 1; Rules of Court (1856), No. 168; *Reg. ex rel. Swan v. Rowat*, 1 U. C. L. J. 109; *Re Municipality of Augusta v. Leeds and Grenville*, 1 Prac. R. 121; *Hud v. Stud*, W. N. (1867), 102, 36 L. J., P. & D. 50; *Gapp v. Gapp*, 28 L. J., P. & D. 48.

8. Grounds of belief should be stated: *B. U. C. v. Spafford*, 2 O. S. 373.

GWYNNE, J.—This is an application to set aside a writ of attachment against an absconding debtor, upon various grounds stated in the summons. The first is, that the writ purports to be and was issued by the clerk of the process in the county of York, instead of the clerk of the Crown and Pleas of the Court of Common Pleas. The contention in support of this objection was that ch. 25 of the Consoli-

dated Statutes of Upper Canada having been separated from the Common Law Procedure Act of 1856, and being subsequent in the statute book to 22 Vic. ch. 22, and inasmuch as there is no clause in ch. 25 similar to sec. 4 of ch. 22, the clerk of the process has no right to issue writs of attachment, and that it must be held that the rule 150 of the rules of court of 1857 is repealed by 22 Vic. ch. 25, and that therefore writs of attachment, by reason of sec. 5 of ch. 25, which gives the form of the writ, comprising the insertion in the margin of such writs of the words: "Issued from the office of the clerk of the Crown and Pleas," &c., &c., must issue from such office and not from the office of the clerk of the process.

In support of this contention *Leeson v. Higgins*, 4 Prac. Rep. 340, was cited, wherein Draper, C. J., held that the Ejectment Act as it stands must be taken to contain in itself all provisions necessary to carry out proceedings in ejectment. In that case the learned Chief Justice held that it was not necessary for the process server to endorse on writs of ejectment the endorsement which, by sec. 19 of 22 Vic. ch. 22, is required to be made on writs of summons. But it may well be doubted (if the act 19 Vic. ch. 43 had continued in force as one act, and had not been divided into several chapters on consolidation,) whether that endorsement need have been endorsed on writs of ejectment, for the sec. 32 of 19 Vic. ch. 43, which is consolidated in sec. 19 of 22 Vic. ch. 22, seems to point only to those writs of summons which are the commencement of personal actions, while the writ in ejectment and the provision as to the services thereof is made by sec. 220, and the subsequent sections of 19 Vic. ch. 43, under the special heading "And with respect to the action of *ejectment*, be it enacted as follows." I do not think that what I am asked to hold here in respect of this first objection is at all a necessary consequence of the decision in *Leeson v. Higgins*. If the statute 22 Vic. ch. 25 contained an express provision that writs of attachment should issue from the office of the clerk of the Crown and Pleas and not from the office of the clerk of



the process, doubtless the objection would be good ; and with respect to the Ejectment Act itself, I take it that the observations of the learned Chief Justice, "that the legislature, by the fact of their having taken the ejectment proceedings out of the Common Law Procedure Act, meant that all the necessary provisions to carry out the practice in ejectment are contained in the Ejectment Act," cannot have any reference to a question as to the office from which the writ shall issue in ejectment. Upon this point it would seem still to be necessary to refer to the Common Law Procedure Act, for the only direction in the Ejectment Act as to the office from which the writ shall issue is that contained in the 3rd section, namely, "that the writ shall be issued out of the proper office in the county wherein the lands lie." Now how can that proper office be determined without reference to the Common Law Procedure Act. By reference to it we find (as the practice is) that sec. 4 provides that in the superior courts the clerk of the process shall issue all original writs, writs of summons, &c., issued from the principal office at Toronto. It is urged that because of the words in sec. 5 of 22 Vic. ch. 25, to be inserted in the margin, therefore the clerk of the process cannot issue a writ of attachment. If that were to govern, then for the like reason he could not issue a writ of summons, for form A No. 1 of 22 Vic. ch. 22 contains the same identical insertion in the margin of that writ. It appears to me to be clear that for determining the office from which a writ of attachment or any other writ shall issue we must refer to 22 Vic. ch. 22, and to the rules of court as regulating the procedure as to the place for issuing writs in all actions, as to which points 22 Vic. ch. 25 is wholly silent ; but even if the points were not clear, I should hold on such a point of practice that *cursus curiæ est lex curiæ*, and uphold the writ, so that the defendant may by appeal, if he thinks fit, obtain the judgment of the full court upon this point.

The second objection is, that it is not shewn with sufficient certainty that defendant was a resident of Ontario, or that he had absconded with intent to defraud his creditors, other



than the plaintiffs. In support of this objection *Higgins v. Brady*, 10 U. C. L. J. 268, was cited. I understand Mr. Justice A. Wilson in this case to have held, that this is a point necessary to be made to appear on the application for the writ, but I do not understand him at all to say that, though it should appear in the affidavits of the two credible witnesses, it would be insufficient for not appearing in the plaintiff's affidavit. Upon this objection I hold that the requirement of *Higgins v. Brady* is sufficiently supplied by the affidavits of Baxter and Wakefield. And as to the point as to defrauding creditors generally, I think it quite sufficient for the plaintiffs to adopt the words set out in the second section of the act.

The fourth objection is that the affidavits of Baxter and Wakefield are too uncertain. This objection was abandoned in the argument, and I think properly so, as untenable.

The fifth objection is, that the affidavits are bad, for being entitled in a court and in a cause between parties plaintiffs and defendant.

Since the passing of the imperial statute 1 & 2 Vic. ch. 110, it has been held in *Schletter v. Cohen*, 7 M. & W. 389, that an affidavit made for the purpose of obtaining a writ of *capias*, under section 3 of that act, if made before the issuing of a writ of summons need not be entitled in the cause. But in *Hargreaves v. Hays*, 5 El. & Bl. 272, although the affidavit was made before the issuing of a writ of summons, it was entitled in a court and in the cause, and upon motion to set aside the order for the *capias* to issue, it was held that the objection could not prevail, *for that although unnecessary it could not vitiate*, and that perjury could be well assigned on the affidavit, but that if there had been a cause in court before the affidavit was sworn, if the affidavit did not contain the title of the cause, it would be bad, because upon such an affidavit perjury could not be assigned. Our own statute 22 Vic. ch. 24, is similar in its provisions to the imperial statute 1 & 2 Vic., so that the above cases are equally an authority with us as in England, and the 6th section of 22nd Vic. ch 24, would seem to shew that the

entitling the affidavit sworn before the issuing of a summons or *capias* in a court cannot vitiate the affidavit. That section enacts that "it shall *not be necessary* that any such affidavit should at the time of the making thereof be entitled of or in any court, but the style and title of the court out of which the process issues may be added at the time of suing out the process, and such style and title, when so added, shall be for all purposes and in all proceedings, whether civil or criminal, taken and adjudged *to have been part of the affidavit ab initio*."

This provision is plainly for the convenience of the party suing out the writ, and to prevent his being delayed, as he might be in case the affidavit was entitled in any particular court, under the practice that the writs shall issue out of each court in alternate order. If entitled in a court, as this affidavit was, the only effect was that the writ must issue in its order out of that court, and the fiat being endorsed on the affidavit so entitled appears to me to be sufficient authority for the attachment to issue out of the Court and in the cause in the title of the affidavits mentioned, and the provision that when inserted it shall be deemed to have been inserted *ab initio*, seems to shew that the insertion would not vitiate it, for if deemed to have been inserted *ab initio*, how can its having in fact been so inserted be said to vitiate the affidavit?

*Hargreaves v. Hayes*, 5 E. & B. 272, above referred to seems to be precisely in point as to that objection, and to remove the objection; moreover in this case there was in fact a cause in court by reason of the *capias*, which is shewn to have previously issued as to three of the notes.

The seventh objection does not affect the validity of the writ, but only the amount for which bail should be taken, which is set in the writ at an amount exceeding the true amount by about \$2.00. *Ross v. Hurd*, 1 Prac. Rep. 158 and *Brett v. Smith*, 1 Prac. Rep. 309 are authorities to shew that this may be amended if desired.

As to the eighth objection, that the affidavits do not state the grounds of deponent's belief that the defendant has

absconded with the intent imputed, although in *The Bank of Upper Canada v. Spafford*, 2 O. S. 373, the Chief Justice says that when the deponent resides at a considerable distance from the defendants, it will be well to lay it down as a rule that the persons deposing as to the absconding of the debtor should state the grounds of their belief, yet I do not think that any such rule has been established in practice; however, the reason suggested for the rule does not apply in this case, and it does not seem to be required by the Statute.

The only objection which remains is the third objection, a portion of which raises the only point that appears to me to involve any doubt, namely, whether the indebtedness is alleged with sufficient certainty. It certainly would be better to adopt the recognized form in affidavits to hold to bail, namely, "that the debtor is justly and truly indebted to the plaintiff in a specified sum upon, &c.," stating the consideration from which the debt arises. The affidavit does, I think, very precisely shew the cause of action, namely, the promissory notes. It shews that the notes were made by the defendant to the plaintiffs: that they are still the holders: the dates of the notes: their maturity and amounts respectively. So that it appears that all the notes are over due. As to three it shews that a writ of *capias* had already been obtained; but as to these three notes the indebtedness of the defendant arising therefrom is stated after the other two notes are stated to have become due and payable, thus, "and the said defendant then became indebted to the said plaintiffs in the amount of such two further promissory notes, as well as the three promissory notes above described." Now, although this mode of stating the indebtedness varies from the ordinary form given for affidavits to hold to bail, still, if perjury could be assigned on the affidavit, it must, I think, be deemed to be sufficient, and I think that the indebtedness is sufficiently stated to afford ground for an indictment for perjury, if false. An affidavit for a writ of attachment may also, I think, be read with a less critical eye than an affidavit to hold to bail, by which the personal liberty is affected.

Although not desiring to encourage looseness in making

affidavits, still as this is a purely technical objection, and there do not appear to be any merits affected by it, and the affidavit has passed under, as it indeed must pass under the consideration of a judge before the fiat issues, and as I think it is sufficiently certain to sustain perjury, if false, I do not think that I should be advancing the ends of justice if I should yield to this objection and set aside the judge's fiat, which has authorized the issuing of this writ. If the defendant should be advised that the objection is good, it will be better, I think, to leave him to his remedy of appeal to the full court. I think all the objections fail, and I shall therefore discharge the summons and with costs.

*Summons discharged with costs.*

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#### IN RE HICKS, AN INSOLVENT.

*Insolvent Act, 1865, sec. 29—Order for committal without summons to shew cause.*

An insolvent cannot legally be committed under sec. 29 of 29 Vic. cap. 18, without an opportunity of shewing cause, and it should appear in the order of committal that he has had notice of the order for delivery, &c., for non-compliance of which an order of committal is asked.

[CHAMBERS, April 22nd, 1869.]

This was an application to discharge a prisoner on a writ of *Habeas Corpus*.

The return set out an order of the Judge of the County Court of Prince Edward, for the commitment of the insolvent to the county gaol for nine months, unless certain moneys and notes were sooner delivered up according to a previous order.

The order, directed to the sheriff, &c., was as follows:—

“Upon the application of the official assignee for the county of Prince Edward, and upon reading an order made by me on the twenty-seventh day of February last past, and the affidavits thereto attached, by which order the said D. S. Hicks, was directed to deliver *to one of the persons in said*



*order* named, the sum of twelve hundred dollars, and also certain promissory notes in said order mentioned, upon or before a day now last past, and upon it appearing to me that said money and notes have not, nor have any portion thereof been delivered as ordered as aforesaid.

“ I do order that the said D. S. Hicks be imprisoned in the common gaol of the county of Prince Edward for the space of nine months, unless said sum of money and notes be sooner delivered. And I do order you, the said sheriff of the county of Prince Edward, to take, or cause to be taken, the said D. S. Hicks, and him safely to convey to the common gaol at Picton, in the said county of Prince Edward, and there to deliver him to the keeper thereof, together with this precept. And I hereby command you, the said keeper of the said common gaol, to receive the said D. S. Hicks into your custody in the common gaol, there to imprison him for the space of nine calendar months, unless the said sum of twelve hundred dollars and notes shall be sooner delivered, and for your so doing, this shall be your sufficient authority.”

This order was made under section 29 of the amended Insolvent Act of 1865, which enacts that, “ If, after the issue of a writ of attachment or assignment, &c., the insolvent retains or receives any portion of his estate, &c., the assignee may make application to the judge by summary petition, and after due notice to insolvent for an order for the delivery over to him of the effects, documents, or moneys, so retained, and in default of such delivery in conformity with any order to be made by the judge upon such application, such insolvent may be imprisoned in the common gaol for such time, not exceeding one year, as such judge may order.”

Many objections were taken to the sufficiency of this warrant.

*C. S. Patterson*, in support of it, conceded that he could not place it on any higher ground than an order to commit for unsatisfactory answers to interrogatories, or for not appearing on a judgment summons.

*J. A. Boyd*, for the prisoner.



HAGARTY, C. J., C. P.—One most formidable objection is the absence of any averment of notice to the insolvent, or of any opportunity given to him to shew cause against his commitment to gaol. The order appears to be made merely on proof of his non-compliance with the previous order, to deliver over the money and notes.

The very nature of the proceeding would seem to require the insolvent to be called on to shew cause before being committed. Many reasons may be suggested why the order was not complied with at once. Illness or other disability, the intermediate loss or destruction of the property, might render compliance excusable or impossible, or at all events operate on the exercise of the discretionary power of commitment.

The often cited case, *Ex parte Kinning*, 4 C. B. 511, is directly in point. The judge there had power to commit for any time not over forty days, if the debtor did not pay the debt at such time as ordered by the court or judge. The order to commit set out the order to pay, default in payment after demand, and service of original order, and then, without averring any further notice to defendant, or opportunity given him to be heard, he was committed for forty days. The Court of Common Pleas discharged him on *habeas corpus*. The act of committal was held to be a judicial, not a ministerial act. Maule, J., adds, "Upon every principle of law and justice it is right that the party should have an opportunity of being heard before this punishment is inflicted upon him \* \* \* The debtor is entitled to notice, and has a right to be heard before he can be committed for disobedience of the order.

Wilde, C. J., Coltman and Cresswell, JJ., all gave judgments to the same effect.

The law is fully reviewed in our own case of *Bullen v. Moodie et al.*, 13 U. C. R. 132, and the same view expressed. See also *Baird v. Story et al.*, 23 U. C. R. 624.

I have nothing before me warranting the imprisonment of the insolvent, except this order, and it seems to me to be defective. For all that appears therein, the insolvent may

never have had any notice of the order made by the judge for the payment and delivery of the money and notes. It merely avers that such an order was made, and the money and notes have not been delivered in accordance with it.

This objection is in addition to that already discussed as to the committal without an opportunity given to insolvent to be heard. The latter defect seems to be fatal, without reference to any of the other points taken.\*

I think I am bound to order the discharge of the prisoner.

*Prisoner discharged.*

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### CAMPBELL V. MATHEWSON.

*Practice in ejectment—Infant plaintiff—Setting aside proceedings.*

An infant plaintiff can sue out a writ of ejectment in his own name; but after appearance entered, he cannot take any further step, such as giving notice of trial, without having a next friend appointed; and any such further proceedings in the infant's own name will be set aside.

[CHAMBERS, May 4, 1869.]

This was an action of ejectment in which notice of trial had been given for the spring assizes for the county of Grey.

*J. A. Boyd* obtained a summons to set aside the notice of trial and notice to admit, with copy and service thereof, and to stay all proceedings till the plaintiff should give

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\* The learned Chief Justice also remarked that it would be well if all orders of this kind contained a short recital of matters, so as explicitly to bring such cases within the 29th section of the act, and set out the substance of the order made on the assignee's application and notice to the insolvent—thus, the service of the order, or at least, averment of notice having been given of it to insolvent, and a demand of the delivery, &c., of the things ordered to be delivered, and then notice of the application to commit and opportunity of being heard against it, and then the order to commit. The statute, as was also observed, is silent as to any alternative committal.—REP.

security for costs, or until a sufficient next friend should be appointed, on the affidavit of the defendant, who swore as follows :

“ That the claim of title to said lot is as follows, as I verily believe, from searches made in the proper registry office : patent of the whole lot to John Gallinger : conveyance from said Gallinger to John Campbell : conveyance of the south half (the premises in question) from said Campbell to one Courtemanche, who gave back a mortgage conveying the legal estate, and to secure the purchase money to the said Campbell : that said Courtemanche, as I am informed and believe, made default in his payments on said mortgage, and thereupon the said John Campbell exercised a power of sale contained in the said mortgage, and sold the said premises by auction sale to his son who was then, and is still a minor under the age of twenty-one years, namely, the above-named plaintiff, Duncan Campbell, and the premises were so sold to the son of the said John Campbell for the sum of one hundred and twenty dollars, being an entirely inadequate consideration ; that after said sale the said premises were conveyed to the said plaintiff by his father in pursuance of such sale, in or about the year 1864 ; and I afterwards entered into an agreement with the said John Campbell and his son, the said plaintiff, for the sale and purchase of the said land, and a bond to that effect was duly entered into between us on the 1st day of May, 1865 ; that on the ninth day of the present month of December, I made application to the said plaintiff and his father for a deed of the said premises, being then ready and willing to pay all that was due in respect of said premises on the footing of the said bond, but they declined, on the ground that the deed of the said plaintiff would be of no use, as he was under age : that I then made inquiries from the father of the said plaintiff as to the age of the said plaintiff, and he referred to some papers, and read out to me the day of his birth, (which I now forget), and stated that he (the said plaintiff) would not come of age for a year and a-half.”

Pending this summons, *Osler*, for the plaintiff, obtained an order for the admittance of John Campbell (who was sworn to be worth five hundred pounds), to prosecute the action.

On the return of Mr. *Boyd's* summons to set aside notice of trial and to stay proceedings,

*Osler* shewed cause, and relied upon the above order, taken out by him, as being an answer to the defendant's application, and asked to be allowed to amend the style of cause in the notice of trial, by inserting the name of the next friend. He objected to the delay in making the application, and relied upon the language of Richards, J., in *O'Reilly v. Vanevery*, 2 Prac. R. 184, that in such cases the defendant could obtain security for costs by applying immediately after appearance. He cited *Cole on Ejectment*, 584.

*Boyd*, in support of his summons, contended that the language of Richards, J., was *obiter dictum*: that the text writers cited referred to no authorities since the action of ejectment was remodelled: that the application was made immediately after the first irregular step: that it was not necessary for the defendant to apply immediately after appearance, as it was not to be assumed that the plaintiff would proceed irregularly: that the appointment of next friend could not relate back so as to give validity to previous proceedings, and that the practice in suits by infants when pleadings were filed, was to set aside the proceedings by them after appearance when no next friend had been appointed. He cited *Doe d. Roberts v. Roberts*, 6 Dowl. 556; *Doe d. Selby v. Alston*, 1 T. R. 491; *Major v. McIntire*, Sm. & Bat. 273; *Byrne v. Walsh*, 5 Ir. L. R. 217; *Grady v. Hunt*, 3 Ir. C. L. R. 522.

HAGARTY, C. J., C. P., held, that the notice in question must be set aside, and, if costs had been asked for, with costs. It was clear the infant had the right to issue and serve the writ without the appointment of a next friend, but he could take no further step in prosecution of the suit without such an appointment. The practice which prevails in



ordinary actions by infants must apply to actions of ejectment, since the Common Law Procedure Act; and in these cases the authorities referred to shewed that any proceeding taken by an infant after appearance, without the intervention of a next friend, would be set aside for irregularity if promptly moved against. He did not feel pressed by the language of Richards, J., referred to, as it might well be that the defendant could have moved for security after appearance and yet have his remedy open of moving to set aside the first proceeding irregularly taken by the infant. The plaintiff in this case having procured the appointment of a solvent next friend, it was not thought necessary to deal with his application for security.

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#### SYNGE v. ALDWELL.

*Law Reform Act, sec. 18—Withdrawal of issue to enable plaintiff to give notice for jury.*

The plaintiff obtained a summons, asking, amongst other things, to be allowed to withdraw his replication joining issue and take the same off the files, and file a similar replication with a notice requiring a jury. The joinder of issue had been filed before the Law Reform Act came into force.

GWYNNE, J., gave the leave required.

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#### REGAN v. MCGREEVY.

*Examination of judgment debtor—Residence within jurisdiction—Member of Parliament.*

An order will not be made for the examination of a judgment debtor whose home is in the Province of Quebec, though temporarily residing in Ontario attending to his duties as a member of Parliament.

[CHAMBERS, May 7, 1869.]

*O'Brien* shewed cause to a summons calling on the defendant, a judgment debtor, to shew cause why he should

not be examined before the judge of the county court of Carleton, under the Con. Stat. U. C. cap. 24, sec. 41. He filed an affidavit of the defendant's brother, from which it appeared that the usual place of residence of the defendant was at the city of Quebec, in the province of Quebec, and beyond the jurisdiction of the court, and that he now resides there: that the said defendant has resided and had his domicil at the city of Qubec all his life, and never resided or had his domicil elsewhere: that he came into Ottawa to attend to his parliamentary duties as a member of the House of Commons of Canada for the Western Division of the city of Quebec, which he represents as a member of the said House of Commons, and that he returned to the said city of Quebec at the end of last week: that the defendant owns real estate in the city of Ottawa to the value of five thousand pounds, far more than sufficient to satisfy the claim of the plaintiff in this cause five times over, and that the plaintiff and his attorney are perfectly well aware of his owning such property, which is registered in his own name.

He contended, 1. That, as the defendant did not reside within the jurisdiction of the court, he could not be examined under the section referred to, nor could the order be enforced against him if he failed to attend, nor could he be punished for contempt in not attending.

2. That the defendant was privileged as a member of Parliament: *Reg. v. Gamble & Boulton*, 9 U. C. R. 546, and that now was the time to take the objection, and not upon any subsequent application to commit him for contempt in case he should fail to attend: see *Henderson v. Dickson*, 19 U. C. R. 592.

*Robert Henderson* supported the summons.

HAGARTY, C. J., C. P., refused to make an order for the examination of the defendant, on the ground that he did not reside within the jurisdiction of the court within the meaning of the statute. He doubted whether the defendant had, as a member of Parliament, any such privilege as claimed on his behalf.

## GILLELAND V. REID.

*Dower—Costs.*

Judgment was signed in dower on default of plea to a declaration which averred demand of dower one month before action, and that the action was brought in less than one year from such demand; but no affidavit of service of the demand was produced to the master on taxation. An offer to assign dower was made before action brought. The master having taxed to the demandant the costs of suit, an application was made to set aside so much of this judgment as related to costs, but *Held*, that the demandant was entitled to costs, and that the judgment was regular.

*Semble*. The declaration is a proper place, though perhaps not the necessary place, for averring the necessary demand of dower, and where it does contain it, the averment is admitted by a judgment by default.

[CHAMBERS, May 14, 1869.]

THE demandant, on the 7th day of December, 1868, filed her count in dower against the defendant in the terms following:—

“COUNTY OF WELLINGTON, { Sarah Gilleland, (by Thomas  
*To Wit:* { Ousely Gilleland, the committee  
of her person and estate, duly appointed under an order of the Court of Chancery for Upper Canada, bearing date the 8th day of January, 1868), widow, who was the wife of John Gilleland, deceased, by R. R. Waddell, her attorney, demands against Joseph Standish Reid the third part of the west half of lot No. 4, in the 4th concession of the township of Erin, in the county of Wellington and Province of Ontario, with the appurtenances, as the dower of the said Sarah Gilleland of the endowment of the said John Gilleland, deceased, heretofore her husband, who was at one time seized of said lands, whereof she has nothing.

And the demandant avers that one month before the commencement of this action, she did by notice in writing demand of the said Joseph Standish Reid her dower in and to the said above described premises, and that the said Joseph Standish Reid, notwithstanding such notice as aforesaid, detained and still doth detain her dower; and the demandant still further avers that this action is brought in less than one year from such demand. And the said Sarah

Gilleland by her said committee, the said Thomas Ousely Gilleland, also claims damages for the detention from her of her said endowment in the said lands from the death of her said husband, and the one-third of the mesne profits arising from the said lands from the death of her said husband ; and the demandant claims \$20."

The defendant did not plead to this, and thereupon, early in February, 1869, the demandant signed final judgment by default. The judgment roll after setting out the count as above, proceeded as follows :

"And the defendant by Donald Guthrie, his attorney, says nothing in bar or preclusion of the said action of the plaintiff whereby the plaintiff remains therein undefended against the defendant. Therefore it is considered that the said demandant do recover from the said tenant, the said Joseph Standish Reid, the one-third part of the lands and premises in the notice and declaration in this cause mentioned as the dower of the said Sarah Gilleland, and that the said demandant do recover against the said tenant Joseph Standish Reid her costs of suit in this behalf, which said costs amount to the sum of twenty dollars eighty-four cents, and that she have execution therefor."

On the 12th February, 1869, the demandant's attorney addressed and sent a letter to the tenant informing him of the entry of judgment, and that the demandant was in a position to put a writ in the sheriff's hands for an assignment of the dower and for \$20.84 costs, and proposing terms of compromise by a money payment in lieu of dower. On or about the 20th February the tenant took this letter to Mr. Guthrie, who immediately addressed a letter to the demandant's attorney insisting that the judgment was wrong and must be abandoned in so far as the same related to costs. On or about the 25th February the demandant's attorney replied to this letter, to the effect that he thought the judgment right, but that he would let the tenant's attorney know before acting on the execution. Accordingly upon the 27th April the demandant's attorney wrote to Mr. Guthrie, as attorney of the tenant, that, unless settled within



a week, he would enforce the judgment by a writ of *hab. fac. seisinam* and *fi. fa.* for costs.

Thereupon, on the 1st day of May, a summons was obtained on behalf of the tenant calling upon the demandant to shew cause why the judgment so far as it related to costs and the taxation and award of such costs, and the *præcipe* and *fi. fa.* therefor, and all proceedings had upon or in respect thereof, or some or one of them, should not be set aside and vacated with costs, on the grounds, among others, that such costs were awarded and taxed contrary to law, an offer to assign dower having been served on the demandant prior to action brought; that there was no trial upon or after which costs could be taxable to the demandant; that there was no evidence before the clerk of the court to warrant the taxation of costs; that it was not made to appear to said clerk that there had been such offer to assign dower; that no notice of such taxation was given to the tenant or his attorney, and upon grounds disclosed in affidavits and papers filed, with leave to file another affidavit shewing what materials were before the clerk of the court on such taxation.

The notice of readiness to assign dower referred to in the summons was annexed to the demand of dower served by the demandant on the tenant, which had an endorsement thereon stating that it was served on the 2nd June, 1868. The demand was in a printed form, having the names of "Messrs. Waddell & Lemon, corner of King and John Streets, Hamilton, Solicitors for demandant," printed thereon, and on the demand was endorsed a notice in the words following: "Mr. Reid, address Messrs. Waddell & Lemon, Barristers, &c., Hamilton." The notice of readiness to assign dower was addressed to the demandant as a lunatic, and Thomas Ousley Gilleland, committee of her person and estate, and was in the words following: "Take notice that Joseph Standish Reid, of the township of Erin, in the county of Wellington, farmer, hereby offers to assign the dower demanded by the said Sarah Gilleland, by her committee as aforesaid, in the west half of lot number four, in the fourth concession of the township of Erin aforesaid." The notice

is dated the 29th July, A. D., 1868, and is signed "Donald Guthrie, attorney for Joseph S. Reid." On this notice is endorsed an admission of service signed, "Waddell & Lemon, Solicitors for Gilleland."

*James Patterson* and *A. C. Chadwick* shewed cause to the summons.

*J. A. Boyd* supported it.

GWYNNE, J.—At the argument it appeared that no evidence of any demand of dower having been made, was laid before the clerk on affidavit, at the time of the taxation of the costs nor any evidence of any refusal to assign the dower, but that the clerk proceeded upon the allegations contained in the declaration, which, there being no plea, Mr. Patterson contended, afforded all that was necessary to enable the clerk to tax the costs; the allegation not being pleaded to being an admission on record of both the demand and refusal.

[After referring at length to the cases of *Bishoprick v. Pearce*, 12 U. C. R. 306; *Quin v. McKibbin*, 12 U. C. R. 323; *Ryckman v. Ryckman*, 15 U. C. R. 266; *Humphries v. Barnett*, 16 U. C. R. 463; *Street v. Rowe* 8 C. P. 213; *Harris v. Morden*, 17 U. C. R. 278, the learned judge continued]:

All those cases were prior to the passing of the Act 24th Vic. ch. 40. The first section of that act provides that "Whenever a widow's right to dower shall have been established in an action for that purpose she shall be entitled to sue out from the court in which such action shall have been brought, upon the judgment entered in such action, a writ of assignment of dower directed to the sheriff of the county where the lands lie, out of which dower has been adjudged to her."

Section 13 provides that, "In all cases coming under section one of this act, the costs of proceeding hereunder shall follow the suit, and shall be recoverable by writ of *fieri facias*, from the goods and chattels or lands of the de-

fendant in such suit; and in all other cases all such costs shall be in the discretion of the court or judge issuing the writ of assignment of dower."

Section 18 provides that, "no action of dower shall be brought until one calendar month's notice in writing demanding the same, has been given by the claimant to the tenant of the freehold."

In *Cook v. Phillips*, 23 U. C. R. 69, the demandant in her declaration averred that her husband did not die seised, and that she demanded her dower pursuant to the statute, and she claimed her dower and damages for its detention. The tenant pleaded "that from the time of the death of demandant's husband the tenant had always been ready and willing to render the demandant her dower, and before the commencement of the suit, and after the *said* demand in writing, and before the expiration of one month thereafter, he tendered and offered the demandant her dower, to receive which she wholly refused, and that he is still ready and willing, &c., and rendereth the same here in court," &c. The demandant replied that from the death of demandant's husband the tenant had not always been ready and willing to render, &c., *for* the tenant did not after the said demand, nor at any time before the commencement of the suit, *render* to demandant her dower. Upon this, issue was joined, and the case was brought down to trial. At the trial it appeared that after the demand was served, the demandant's attorney was served with a notice in writing, that the tenant appointed a day named to meet her on the land for the purpose of assigning to her dower: that at such time and place he would assign the same to her, and that if she should not come as required, the tenant would object to her right to recover costs. The tenant was in attendance on the day named from 10 A. M. to 5 P. M., but neither the demandant nor any one on her behalf attended, she having mistaken the day; that on the following day she did attend, but as she did not attend on the day named, the tenant would not give the dower, and on a subsequent occasion the tenant told the demandant that as she had not come on

the day named, he would have nothing to do with her, but that she might send the sheriff. The judge who tried the cause, having upon this evidence charged the jury that the demandant was entitled to recover on the issue, and the jury notwithstanding having found a verdict for the defendant, it was held that the verdict could not stand, as the evidence did not support the issue, which was that the tenant did not render the demandant her dower, but refused so to do. In giving judgment, Draper, C. J., says: "If, on a future occasion, the propriety of introducing such averments into the declaration [as to her husband not being seised, and the demand of dower by demandant] should be brought in question, we shall have to consider the effect and meaning of the first section of the Dower Act." And again: "There is nothing said in the statute about the tenant's pleading the absence of a demand of dower nor his own offer to assign, which admits her right, and we are not satisfied that it would be necessary, unless there be on the record some averment or suggestion which he is bound to traverse or answer."

In *White v. Grimshawe* 23 U. C. R. 75, to a declaration in dower, the tenant pleaded *tout temps prist*. Whereupon the demandant filed a suggestion of demand and refusal, claiming damages, and signed judgment for want of a plea to the suggestion, and assessed damages. The assessment was set aside as irregular, there being no averment that the husband died seised. Draper, C. J., in giving judgment says: "We look upon the suggestion itself as valueless;" and with reference to section 18 of 24th Vic. ch. 40, he says: "It will be necessary for the future that, as in actions against magistrates and public officers acting in the discharge of their duty, proof of this notice of action must be given, with this notable difference, that there is no authority for pleading any plea by statute, under which all defences are open, and therefore the *tenant will have to plead* the want of notice as a defence under 24th Vic. The want of such a plea will not, so far as I can see, affect the right to costs under the seventh section of the former act."

In *Scratch v. Jackson*, 25 U. C. R. 598 and 26 U. C. R. 189,



the demandant in her declaration alleged that her husband died seised, and she claimed damages from the time of his death, and she also averred service of a demand of dower. The tenant did not plead and the demandant went down to assess damages. At the assessment of damages it was not established that the husband had died seised, and it was therefore held that the demandant was not entitled to damages under the statute of Merton, but that, as costs are given because the demandant was compelled to sue for dower wrongfully withheld after demand, such wrongful withholding gave a right to nominal damages quite distinct from the right given by the statute of Merton. Draper, C. J., delivering the judgment of the court, says, in 26 U. C. R. 191 : "The Dower Act provides that the action shall be commenced by filing a declaration or plaint in the form heretofore used. In the forms then in use when the demandant counted, which was not until the tenant had appeared, there was no averment that the husband died seised, for it would be wholly out of place according to the then mode of proceeding, and it seems to be equally out of place now, for the demandant's claim to dower depends on the husband's seisin during coverture and not upon his dying seised. I am inclined to treat the averment of the notice to the tenant demanding the dower to be equally out of place in the count. Both of them are unimportant and irrelevant to the demandant's right to recover dower, and until that is established there can be no question as to damages or costs. Such averments being, in my opinion, irrelevant, the tenant, by not traversing does not admit them. Here the tenant has not pleaded, and he has admitted seisin of the husband during coverture and the right to dower. The present proceeding is for damages and to shew also a right to tax costs, though possibly all that is indispensable for that purpose, where there has been no trial, is to produce the notice of demand and the affidavit of service to the Master at the taxation."

Upon this state of the authorities I am called upon to determine whether, upon a judgment by default signed to a

declaration containing the averments which the declaration in this case contains, as above appears, the taxation of costs was irregular and should be set aside, there having been no affidavit of service of the demand produced to the Master at the taxation.

An averment in a declaration that the demandant's husband died seised, though judgment be entered for want of a plea, is not in my judgment admitted on the record. The denial of the husband having died seised is no plea in bar to the right to dower; such an averment is, I think, irrelevant in a count, it is a matter only available to entitle the demandant to damages on her right to dower being established, and is a matter which, as it appears to me, whether the right to dower be denied by a plea or be admitted by a judgment by default, must be *proved* by the demandant; and prior to the statute 24th Vic. ch. 40, I should have been of opinion, but for the decision in *Harris v. Morden*, that the averment of the necessary demand to entitle the demandant to costs, though contained in a count, was not admitted by a judgment by default. *Street v. Rowe* had decided that a judgment by default on a suggestion, after judgment by default for want of a plea to the count claiming dower, did entitle the demandant to her costs, and Richards, J., there observes: "If the allegation were introduced into the declaration *and properly formed part of it*, and was not denied, is it not admitted in the same manner as any other allegation?" That case, however, does not decide that the declaration is the proper place for such an averment: it does decide that a suggestion is a proper place, and that if not denied after a suggestion the demand is admitted on the record; but *Harris v. Morden* is an express authority that judgment by default on a count in dower containing an averment of the necessary demand does entitle the demandant to her costs. Since the passing of the 24th Vic. ch. 40, it appears to me to be placed beyond doubt that the declaration is a *proper* place, though not perhaps the *necessary* place for averring the necessary demand, for a month's notice in writing demanding dower is now not only neces-

sary for the purpose of establishing a right to costs, but the absence of such a notice is a bar to the action for the dower. If a declaration should now be filed not containing such an averment, the tenant, to avail himself of the want of such demand as a bar to the action, would, upon the authority of *White v. Grimshawe*, have to plead that no demand was made, and if such plea should be found in his favor he would bar the action, and so bar the demandant's recovery of costs, while if the plea should be found against him, the demandant by proving the demand would, while establishing her right to recover in the action, be establishing also her right to costs, unless it should appear that the action was not commenced within a year from the demand, which by sec. 7 of 22nd Vic. ch. 28, it must be to entitle her to costs. If, then, a demandant chooses to aver in the declaration the necessary demand which entitles her to recover the dower in the action, the tenant suffering judgment by default, as it appears to me, admits that demand; and if the demand averred in the declaration be, as it is in this case, a demand within the year preceding the commencement of the action, that is *the* demand which the judgment by default must admit, consequently the demand admitted by the judgment by default on this record is such a demand as not only is necessary to entitle the demandant to recover a judgment of seisin in the action, but also such an one as entitles her to costs; so that it appears to me on this record the demand entitling the demandant to costs is sufficiently admitted, whatever might be the decision, if the averment in the declaration was simply of a month's notice in writing demanding dower, without averring such demand to have been made within the year preceding the commencement of the action. But it is said the right to costs may be defeated, although the demand entitling the demandant to her costs, as well as to her dower to be recovered in the action, be proved or admitted, if after the demand and before the action the tenant has offered to assign the dower. That is a matter which must proceed from the tenant, and the benefit of that defence to the right to recover costs may, as it appears to

me, be waived or abandoned upon the record by the tenant. If to a count demanding dower, containing or not containing an averment of the necessary demand, the tenant should plead only that no demand was made, that plea must be taken to be his only defence in bar of the action, and on the trial of that issue he could, in bar of her costs, although he should fail on the plea, prove his offer to assign the dower; but if he suffer judgment by default to the action, and so admit the right to recover in the action, then, on the authority of *Harris v. Morden*, the demandant would be entitled to her costs, although no issue was raised or inquiry could be made whether the tenant had or not offered to assign the dower. In such case no suggestion upon the part of the demandant could be necessary for the purpose of establishing that the tenant had not offered to assign the dower; the suggestion that he had so offered would properly come from him to *deprive* the demandant of her costs, and in such case the application, as it appears to me, should be for leave to file such a suggestion by the tenant. But the statute 24 Vic. ch. 40, appears to me to affect the question of costs as well as the demandant's right to recover her dower in the action. The 18th section of the act provides that no action for dower shall be brought until one calendar month's notice in writing demanding the same has been given to the tenant. The want of such notice is then a bar to the action. Section one provides that, *whenever* a widow's right to dower shall be established in an action for that purpose she shall be entitled to sue out a writ of assignment of dower directed to the sheriff of the county where the lands lie. This section includes a judgment for recovery of dower on a judgment by default. If the tenant had offered to assign the dower before action the second section enables him to apply to a judge for a writ of assignment of dower, and so to *submit* to the judge the question of his liability to the costs not only of the action but also of the assignment, according as the judge shall be of opinion that the action was or not proper, or the offer to assign dower was or not sufficiently definite as to the lands offered to be assigned to have been



reasonably accepted, so as to dispense with the necessity of the writ of assignment. But if instead of applying to a judge the tenant permits the action to proceed, and has no defence to bar it, and suffers a judgment to be recovered therein, whether upon a trial or by default, then the writ of assignment issues upon the judgment, and by the 13th section the costs of executing that writ *shall follow the suit* and shall be recoverable by writ of *feri facias*. These costs, then, as it appears to me, are by this section made costs of the suit, and are therefore recoverable by the demandant in all cases wherein the demandant shall have recovered a judgment in her action for the dower, and they shall be recovered by a writ of *feri facias*, the ordinary writ for the levying of costs recovered by a judgment. The act does not provide any other authority for the issuing of the writ than the judgment in the action. They are recoverable as "following," which, as I take it, means *incidental* to the suit and the judgment therein, and consequential upon a writ of *feri facias* issued thereon. If, then, the latter part of section 7 of 22nd Vic. ch. 28, still applies to deprive a demandant of her costs, although the demand by that section made necessary to entitle her to costs is averred in and established by the record, and so that there should be no judgment in favor of the demandant for any costs upon the record, what is it which will authorize the issuing of a *feri facias* to recover costs under section 13 of 24th Vic. ch. 40? It seems to be contrary to principle to issue a *fi. fa.* for the recovery of any certain sum by way of costs, for the determining the amount of which no means are provided by the statute, and no judgment rendered unless they be the costs like those in any personal action, recoverable under the writ as incident to its execution, and which writ has already been authorized by a judgment in the suit awarding the demandant her costs of suit.

This seems to me to be the mode by which full effect can be given to the words in the 13th section of 24th Vic., viz.: "In all cases coming under section one of this act the costs of proceedings hereunder shall follow the suit, and shall be

recoverable by writ of *feri facias*; "and to the words in the 7th section of 22nd Vic. ch. 28, viz.: "In case it appears that a demand in writing had been made of the dower claimed, &c., *costs shall be allowed* to the demandant in the same manner as costs are allowed to a plaintiff in personal actions;" while the 2nd section of 24th Vic. gives to a tenant who has offered to assign dower before action brought, all the necessary opportunity for availing himself of that offer to procure the exemption from the liability to the costs of an action, which the latter part of section 7 of 22nd Vic. had provided for him.

But whether this be the true construction of the statute or not, *Harris v. Morden* is an express authority that, independently of the statute, the judgment for costs in this case is regular, and since that statute, I am of opinion that, *a fortiori*, inasmuch as the want of a month's demand in writing of dower is a bar to the action, it is proper, though it may not be necessary, that the declaration should contain an averment of the giving of such notice, and that when it does contain it the averment is admitted on the record by a judgment by default; and when the demand so averred is also averred to have been made within the year preceding the commencement of the action, that it is the demand which is admitted, and therefore the right to costs also is admitted on the record. In such a case, therefore, the onus, as it appears to me, is cast upon the defendant, (if the effect of the statute 24th Vic. is not such as impliedly to subject him to costs if he suffers the action to proceed to judgment), in order to exempt himself from liability to the costs of the action, to place a suggestion upon the record by way of a plea, or at least within the time for pleading, for, after judgment by default and costs taxed, he could only ask the permission then to make the suggestion, upon payment of costs if the judgment be regular; and in the absence of such a suggestion, it appears to me that, upon a judgment by default to a declaration containing an averment of demand, such as the declaration in this case contains, the Clerk is bound to tax the demandant her costs as has been done here.

The summons therefore must, in my opinion, be discharged, the judgment being regular.

*Summons discharged.*

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CLANCY V. CLANCY.

*Arbitration—Reference back—Mistake.*

An arbitrator, as appeared from his minutes taken on the arbitration and other evidence, having misconceived certain facts and misunderstanding some alleged admissions by counsel, whereby he awarded differently from what he otherwise would have done, the award was referred back to him for re-consideration and re-determination as to the particular item affected by this mistake, with special directions as to costs.

[PRACTICE COURT, Easter Term, 1869.]

The plaintiff declared in this action upon the common counts for work and labour, interest, and upon an account stated. Attached to his declaration was a bill of particulars claiming for services rendered between the 12th January, 1862, and December 3rd, 1867, inclusive of interest, the sum of \$1609.99. Among the items in this bill was an item under date May 19th, 1865, for two and a half months' rafting at Thunder Bay at \$20.00, = \$50.00; the next item to this in the bill was, "Services from August 24th, 1866, to October 9th, 1866, 41 days, at \$35.50 per month, \$55.76.

To this declaration the defendant pleaded never indebted, payment and set off. The defendant served a bill of particulars, professing to set out a balance sheet of a debtor and creditor account from February 18th, 1862, to date, viz, March, 1862, claiming a balance of \$471.08 as due to the defendant.

At the trial a verdict was taken by consent in favor of the plaintiff, subject to the award and arbitration of Mr. Albert Prince, Q. C., who made his award, bearing date the 15th July, 1868, reducing the plaintiff's verdict to \$473, in which amount he awarded that the defendant was indebted to the plaintiff. The order at *nisi prius* referred only the cause and the matters therein. In Michaelmas Term last the

award was made a rule of court, and in the same term a rule *nisi* was obtained to set aside the award, or to refer back the the matters in dispute to the arbitrator, for the following reasons:—

1st. That the arbitrator acted beyond his authority in allowing the particulars of plaintiff's claim to be amended by adding thereto a claim of \$318 for plaintiff's services from 1st August, 1865, to 24th August, 1866, and in afterwards allowing the plaintiff a credit therefor in arriving at the balance found in plaintiff's favor.

2nd. That the arbitrator acted contrary to the evidence in allowing the plaintiff's said item of \$318, which he could not legally recover from the defendant in this action.

3rd. That the arbitrator committed a mistake under a misapprehension of admissions made during the reference by the counsel for the defendant, and from a misunderstanding of what said counsel did admit or intended to admit, but for which the arbitrator would not have allowed the said item of \$318 to the plaintiff.

4th. That the said arbitrator made a mistake in disallowing the defendant two items, one of \$101.25 and the other of \$127, referred to in said arbitrator's minutes, on the supposition that such items had been charged twice in the defendant's account when the same is not the fact.

*Harrison, Q. C.*, shewed cause.

*John B. Read*, contra.

The cases cited are referred to in the judgment of

GWYNNE, J.—The first objection as to the insertion of the additional item in the plaintiff's bill of particulars was waived on the argument for the reason that plaintiff's counsel admitted that, assuming it to be an item really representing services rendered, he should have made an application to the court at the time.

I do not think it would be proper in me to entertain the application at all in respect of the \$101.25 or the \$127, lest I should thereby appear to express a doubt as to the impos-



sibility of opening an award upon a matter of fact within the jurisdiction of the arbitrator where no mistake appears on the award nor is admitted by the arbitrator, and where there is no discovery of any new evidence which could not have been obtained before, upon the mere suggestion, although on oath, of the unsuccessful party that upon the evidence laid before the arbitrator he has arrived at a wrong conclusion. The principle that an award cannot be opened under such circumstances is too firmly established to require now any reference to authorities, however, I refer to the following as conclusive on the point: *In re Hall v. Hinds*, 2 Man. & Gr. 847, where the peculiarity of the circumstances constitutes no exception to the rule; *Phillips v. Evans*, 12 M. & W. 312; *Hogge v. Burgess*, 3 H. & N. 297; *Faviell v. Eastern Counties R. W. Co.*, 2 Ex. 344; *Bernard v. Wainright*, 19 L. J. Q. B. 423; *Hodgkinson v. Fernie*, 3 C. B. N. S. 189; *Latta v. Wallbridge*, 7 U. C. L. J. 207; *Severn et al. v. Cosgrave*, 2 U. C. L. J. N. S. 11.

In respect of the \$318, the application was supported by the affidavits of the defendant and his attorney, and the minutes of the arbitrator, a copy of which was furnished by him for the purpose. This item was inserted in the plaintiff's bill of particulars during the arbitration, between the items above extracted, under date of May 19th 1865, and "services from August 24th 1866," in the following terms: "services from 1st August, 1865, to 24th August, 1866, at \$25 per month, \$318." Mr. Atkinson, the defendant's attorney, in the fourth paragraph of his affidavit says that, as to the item of three hundred and eighteen dollars it was added to the plaintiff's account at the time of the reference, and was a charge for wages from about August, 1865, to August, 1866, during which time, it appeared by the evidence given at the reference in this cause, the plaintiff and the defendant were interested jointly in getting out pine timber at Thunder Bay, Michigan, for Messrs. Norris & Neelan, and this item was added for his wages there, as if he was not a partner in regard to the same, on application of plaintiff's counsel, but I never supposed it could or would be

allowed by the referee. And in paragraph six he says : " When the evidence tendered by both parties was closed at Chatham, Mr. O'Connor, plaintiff's counsel, asked for an adjournment to Windsor, to enable him to put in the answer of the defendant which had been filed to a bill in Chancery there at the suit of the plaintiff's father, since the issue of the writ in this cause, by which he sought to establish himself as a partner of the defendant, and which answer denied such partnership. I then stated that I had not urged non-joinder of Patrick Clancy in this cause as a defendant, nor did I intend to do so, and would waive any right to object on account of Patrick Clancy's evidence to that effect, as we in fact denied such partnership, but it had no reference whatever to the " Thunder Bay " venture between the plaintiff and defendant to this suit, and the referee is in error in supposing so, or at all events has misunderstood my admission and me in regard to the same."

By the arbitrator's minutes, taken at the arbitration, the \$318 appears to have been allowed to the plaintiff as for wages. At the foot of his minutes he says : " I think plaintiff has shewn a claim to amount of \$473, for I should not allow interest there. It is proved there was a partnership in the Thunder Bay venture, and, if so, plaintiff cannot recover for that, yet defendant's attorney expressly waived all objection to plaintiff's claim on that ground, so I hope the Chancery suit spoken of as pending, does not involve an account of that partnership, for my award includes that."

I have doubted much whether I could properly look at this document, for it purports to be dated August 11th, 1868; but that date is under a certificate, signed by the arbitrator, for the purpose of sending it to the defendant's attorney, thus—" a true copy," August 11th, 1868. The document itself is headed—Copy of Minutes of Albert Prince on Arbitration in *Clancy v. Clancy*.

So that I understand the document to represent the minutes which the arbitrator took during the arbitration, and as such it may perhaps be referred to equally as a document signed by the arbitrator at the time of the award, the

paper subsequently furnished being certified as "a true copy." In this view I regard it, and even though it were a statement wholly made at a period subsequent to the award, I think it would be adhering too strictly to the rule as to excluding matters subsequent to the award, where the question is not as to whether the arbitrator has arrived at a correct conclusion upon matters within his jurisdiction, but whether he has by mistake exceeded his jurisdiction, and so, by that mistake, decided otherwise than he intended to do.

I have been perplexed to understand, and cannot say that I yet do, how this mistake as to the partnership could have arisen. What necessity there could have been supposed to exist for Mr. Atkinson waiving anything as to a partnership between Patrick Clancy and the defendant I cannot understand. He says that he had made no objection for non-joinder and that he did not intend to do so, and that he waived all right to object on account of his evidence that he was a partner with defendant. But if he had been a partner with the defendant, or even a co-defendant in the suit, there could have been no objection to the plaintiff examining him as a witness. What it was that Mr. Atkinson understood he was waiving, or why the arbitrator should ask him, or why he should have supposed that he asked him, whether or not he would waive a right, *which he had not*, to object to Patrick Clancy's evidence, I cannot understand. Again, if it was an objection in respect of a partnership between the plaintiff and the defendant that the arbitrator understood Mr. Atkinson to waive, I cannot understand the observations at the foot of the minutes, that he hoped "the Chancery suit spoken of did not involve an account of that partnership." The Chancery suit spoken of, as I understand it, was between, or was said to be between Patrick Clancy and the defendant. How, then, could that suit or any accounts to be taken in it be supposed to involve the plaintiff's claim, which is made for services rendered either to the firm or to the defendant? The observation seems to imply that Mr. Prince understood the Chancery suit to have been between the plaintiff and the defendant. He says: "It is

proved there was a partnership in the Thunder Bay venture, and if so plaintiff cannot recover for that, yet defendant's attorney expressly waived all objection." If the partnership was between Patrick and the defendant, undoubtedly the plaintiff would be entitled to recover against the defendant upon this record for services, if any, rendered by the plaintiff to the partnership; but if the partnership was between the plaintiff and defendant, nothing arising out of that partnership was referred to Mr. Prince by the order of reference. If referred to him at all it must have been by an oral submission during the progress of the arbitration, and then, as it appears to me, that matter would more properly have been separated from the matter of the suit and the verdict therein, and the award should have recited the parol submission to enable Mr. Prince to award as to the partnership. It should not, I think, have been arbitrated upon as services rendered by the plaintiff so as to form part of the verdict, unless, at least, the waiver of the partnership was accompanied with an express understanding that the arbitrator was to deal with the matter as if there had been no partnership, and to arbitrate upon it as if the plaintiff had rendered services on a contract of hiring. I do not gather from any of the affidavits that this was understood by any one to have been what was agreed to or intended; and yet there must, I presume, have been some evidence given by the plaintiff in respect of this \$318, and when given I cannot understand how Mr. Atkinson should have failed to make himself understood that he objected to a claim being made as for services rendered by one partner to the other in respect of the partnership venture.

The defendant says that pressing business prevented the possibility of his being present at the arbitration; perhaps this circumstance caused the difficulty. He swears distinctly, as to the \$318, that from August, 1865, to August, 1866, the plaintiff and he were jointly interested in getting out pine timber for Norris & Neelan at Thunder Bay, Michigan, and that the plaintiff was not in defendant's employment then at all; that the plaintiff was interested in the venture



to the amount of the half of three-eighths of the proceeds after deducting expenses advanced for the timber and getting it out. He swears that the \$318 should not be in any way charged against defendant, and that it would not have been if the venture had not turned out to be a losing one, and that he was not aware of such a charge being made against him till after the award was made. He further says that at the time of the reference there was a suit in chancery pending against defendant at the suit of Patrick Clancy, by which he sought to establish himself to be a partner with defendant, and that defendant believes that Mr. Prince mistook the waiver of Mr. Atkinson to the partnership and applied it to the Thunder Bay venture, as he continues: "Mr. Atkinson informs me he made no waiver as to the Thunder Bay matter, and he would certainly be doing me a gross wrong had he done so."

The manner in which the plaintiff procured the insertion of this item in his bill of particulars during the arbitration, and while defendant was absent, is no doubt suspicious. Had plaintiff been entitled to charge for services during that period it is not probable that he would have neglected to have it inserted in his bill of particulars attached to the record. Then the plaintiff's attorney, in an affidavit filed by him, says: "That in the plaintiff's claim herein there are charges for services rendered by him for defendant at Thunder Bay in 1865, at which time there appeared by the evidence to have been a partnership existing between the defendant and one Patrick Clancy. When this evidence was given, Mr. O'Connor, counsel for plaintiff, stated that if Mr. Atkinson objected to those items being taken into account by the referee he would have to drop them; Mr. Atkinson then agreed to waive all objection on account of such partnership. And again, after the evidence had been taken Mr. Prince asked counsel if it was understood that he should go into the whole accounts, and if Mr. Atkinson waived all objection on account of partnership, when Mr. Atkinson said he did, and it was distinctly understood that the arbitrator should go into the whole account, and that all objections on account of partnership were waived."

Now, with respect to this affidavit it is observable that it never even remotely alludes to any partnership between the plaintiff and defendant, nor to any evidence of the existence of any such partnership having appeared at the arbitration, yet Mr. Atkinson's affidavit, to which this is an answer, distinctly swears that such evidence did appear, and Mr. Prince's minutes, annexed to Mr. Atkinson's affidavit, I understand to admit the same fact. I understand the affidavit of the plaintiff's attorney then to admit the correctness of Mr. Atkinson's understanding as to what he had waived, namely, all objection in respect of a partnership between Patrick Clancy and the defendant, although the necessity of such waiver still remains wholly unexplained. I should rather think Mr. Atkinson's objection to Mr. O'Connor giving evidence as to the \$318 inserted in the bill of particulars was because it had not been inserted there before, and that he waived all objection to its being inserted, leaving the item to be established by evidence of services, if that could be done, which, by reason of the partnership, he knew could not be. However, when I read the affidavit of the plaintiff's attorney as an answer to specific matters alleged in the affidavit and papers filed in this motion, I cannot but take it as a confirmation of Mr. Atkinson's view of the waiver. Then the plaintiff's own affidavit is in precisely the same frame as that of his attorney. He not only does not deny the allegation in Mr. Atkinson's affidavit as to the evidence appearing on the arbitration of a partnership between the plaintiff and defendant during the period for which the plaintiff charges the defendant \$318 for services, but he does not condescend to allude to the specific allegation of such partnership, and of the amount of the plaintiff's interest therein asserted in the defendant's affidavit, nor does he condescend to notice the allegation in the defendant's affidavit that the venture was a losing one, and that is the reason why the plaintiff has made a claim for services wrongfully against the defendant. The plaintiff's affidavit, then, to my mind, also clearly confirms Mr. Atkinson's statement that it was an objection in respect of a partnership between

Patrick and the defendant, and not between the plaintiff and defendant, that he waived, although the necessity for such a waiver is inexplicable so far as I can see.

I take it, then, to appear that in fact an item has been allowed in this action as for services rendered which was in truth a partnership transaction, and not admissible in the arbitration in this suit, and that the allowance of this item would be an excess of the arbitrator's jurisdiction, unless, at least, all objection was clearly waived, and that it was agreed that plaintiff's services in the matter of the venture were rendered on a contract of hiring. I take it also to appear that the arbitrator allowed this item under a mistaken idea that the parties had agreed that all objection as to the partnership between plaintiff and defendant had been waived, and that his jurisdiction was extended so as to cover this item, and that he was at liberty to regard the services claimed for as rendered under a contract of hiring, when I do not think that such an agreement is shewn to have been made. I think it clear, if I am not precluded from so ruling, that in some unaccountable way a mistake has arisen in this matter, and that the result of the mistake, if a partnership did in reality exist between the plaintiff and defendant might operate as a great injustice to the defendant if that partnership was in truth a losing concern. As Lord Denman observes in *Hutcheson v. Sheppeton*, 13 Q. B. 958: "Though fully sensible of the propriety of observing the greatest caution with regard to this subject, to avoid enquires which would unravel bygone transactions and keep alive the litigation which the parties had hoped to terminate by reference, I cannot think the rule universal and subject to no exception. It is at most one for guiding our discretion, which cannot be so absolutely fettered and rendered powerless." If awards are allowed to be questioned under any circumstances it may be difficult to draw a line, but a line must be drawn somewhere, and this case will not, I think, be found to fall within it wherever drawn. If there has been a mistake as to the jurisdiction given to him by Mr. Atkinson's alleged waiver, he has awarded differently from what, but

for that mistake, he intended to do; and upon this principle I think I am justified in referring the matter back to him upon this single item, so that the mistake, if any, may be rectified. But the matter as to the mistake occurring, as it is said to have done, if there was really a partnership between the plaintiff and defendant in respect of the matter for which the \$318 has been allowed, is so singular that I do not purpose to adopt the affidavit of the defendant that such a partnership did exist. If the evidence already taken enables the arbitrator to determine that fact without further evidence, it will not be necessary that any further evidence should be taken, that will be a matter in the discretion of the arbitrator.

I propose to refer the case back to the arbitrator for reconsideration and redetermination upon the single item of the \$318, charged by the plaintiff for alleged services between 1st August, 1865, and 24th August, 1866, the award being confirmed in all other particulars; and as the defendant's absence during the arbitration may have contributed to the mistake, if any there has been, I shall not give him any costs of this application, neither shall I allow to the plaintiff any costs of this application in the event of the arbitrator, upon reconsideration, excluding that item as not allowable by reason of the alleged partnership. But in the event of the arbitrator, upon reconsideration of the matter, still finding that the item is properly chargeable by the plaintiff and payable by the defendant as for services rendered, then the plaintiff, upon taxation, is to have the costs of his opposing this application as costs in the cause, and the costs of the reference back are to be in the discretion of the arbitrator, as provided in the original order with respect to the costs of reference.

Unless the parties wish a time to be specified for the award to be completed upon this reference back, the time shall be as is provided in such cases by the Common Law Procedure Act.

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## WALKEM v. DONOVAN.

32 Vic. ch. 6, sec. 17—*Entry on issue.*

The entry required by sec. 17 and schedule A of the Law Reform Act, 1868, to "be made in the issue and subsequent proceedings" when it is desired to take a superior court case down for trial to a county court, is sufficient if made on the issue book in place of the *venire facias*.

[CHAMBERS, June 9, 1869.]

This was an action brought in the Common Pleas. The defendant desiring to bring it down to the county court for trial, gave notice of trial for the same, making the entry required by the above act on the issue book alone.

*O'Brien*, for defendant, obtained a summons calling on plaintiff to shew cause why the issue filed and served herein, and the notice of trial served herein, and all subsequent proceedings, should not be set aside for irregularity in this, that the seventeenth section of the Law Reform Act, 1868, had not been complied with, by making an entry in the said issue filed and served, and said notice of trial and subsequent proceedings in words, or to the effect in form A. in the schedule to said act.

Cause being shewn it was contended that the word "issue" meant issue book, which did contain the notice required, and that the defendant had no defence on the merits.

*O'Brien*, contra. The word "issue" means joinder of issue, and "entry" refers to an entry on record, and the notice should appear of record. The words "subsequent proceedings" must refer to other matters than the record merely.

ADAM WILSON, J.—I think the entry is sufficiently made by being made on the issue book in place of the *venire facias*. The summons must be discharged but without costs.

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## FITZSIMMONS V. MCINTYRE.

*Prohibition—Striking out counts—Jurisdiction—Joinder of counts—Partial prohibition.*

A county court judge, at the trial of a case made an order, upon the application of plaintiff's counsel, striking out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction.

*Held* 1. That he had the power to do so.

2. That if prohibition had been applied for before trial, it would only have been granted as to that count.

3. That different causes of action included in same declaration may be severed, and tried separately.

[CHAMBERS, June 18, 1869.]

The record in this case contained three counts; 1st, for breach of covenant; 2nd, for assault; 3rd, trespass *quare domum fregit*. To the third count defendant pleaded "that the dwelling house was not the plaintiff's, as alleged."

The record was entered at the last sittings of the county court at Pembroke, and a summons for a prohibition was granted before, but not served till after trial.

At the trial, defendant's counsel objected to the jurisdiction, as the title to land was brought into question by the plea to the third count, whereupon the plaintiff's counsel applied to the judge for an order striking out the third count and all pleadings relating thereto—which was granted, and the judge proceeded to try and tried the remaining issues. A verdict was given for plaintiff. The defendant then obtained a summons for a prohibition.

*Harrison, Q. C.*, shewed cause. The three counts in the declaration contained separate and distinct causes of action, and the judge at the trial had power to sever them. The judge having struck out the third count and pleadings relating thereto, there was nothing on the record to take away his jurisdiction. The judge had power to make such an order, but if he had not done so, but had allowed the record to remain as it was, he could have tried the issues on the first two counts, and in that case the prohibition might have gone as to the third count: see *Walsh v. Ionides*, 1 E. & B. 383, and *Kerkin v. Kerkin*, 3 E. & B. 399.

*Osler*, in support of summons. As soon as the plea bringing the title to land into question was pleaded, the judge's jurisdiction ceased, and he had no power to do anything whatever in the case thereafter.

GWYNNE, J.—The defendant obtained a summons calling upon the plaintiff to shew cause why a writ of prohibition should not issue to prohibit the judge of the county court of the county of Renfrew from further proceeding with a cause in the county court at the suit of *John A. Fitzsimmons v. James McIntyre*. Upon argument of the summons it appeared that the declaration in the cause contained three counts; 1st, for breach of covenant; 2nd, for assault; 3rd, trespass *quare domum fregit*, and *asportavit* of chattels. Issues in fact were joined in respect of the causes of action in the 1st and 2nd counts. To the third count the defendant pleaded that the dwelling-house was not the plaintiff's, as alleged. To this plea there was a demurrer. Now these counts contain several and distinct causes of action, and I think it clear, upon the principle and authority of *Walsh v. Ionides*, 1 E. & B. 383, and *Kerkin v. Kerkin*, 3 E. & B. 398, that the prohibition, if granted, should be restricted to the cause of action contained in the 3rd count. Causes of action of this nature, though capable of being joined in one action under the provisions of the Common Law Procedure Act, are still so far distinct, that a judge may, if he thinks fit, order one or more of the causes of action contained in several counts to be tried separately from those in another or others; and I can see no reason, therefore, why a prohibition may not, nor indeed, why it should not be restricted to that count which alone is in excess of the jurisdiction, leaving the others to be disposed of by the County Court, as the proper court wherein they should be tried. It further appeared that what in fact has been done is that, at the trial which came on before the summons was served, the judge, by an order made on the record, expunged the third count and all the pleadings in respect thereof from the record, and thereupon, the trial of the issues joined on the

other counts proceeded, and a verdict was rendered on them alone. This, as it appears to me, is just what the exigency of the case required the judge to do, and the defendant has therefore obtained all the relief that he was entitled to, or that he would have received by a writ of prohibition. It is therefore unnecessary that the writ should issue, and the summons must be discharged.

*Summons discharged.*

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CUSHMAN ET AL. V. REID.

*Law Reform Act, 1868—Order to try in County Court—Jury.*

An action on a promissory note made in United States sued on as if made in this Province, and payable in Canadian currency, was brought down for trial from a superior court to a county court, without a judge's order.

*Held* 1. That such case was improperly brought down, and that it was one in which an order was necessary.

2. That under sec. 18 of the Law Reform Act judges of county courts can try cases brought down from superior courts without the intervention of a jury.

[CHAMBERS, June 25, 1869.]

This was an action brought on a promissory note made at Chicago, and dated the 1st March, 1867, whereby the defendants, jointly and severally with the other persons who were not sued, promised to pay the plaintiffs, or order, nine hundred dollars, twelve months after date, with interest at ten per cent. This note was declared upon as if made in this Province, and payable in Canadian currency, but by an admission signed by the attorneys of both parties, it was admitted that the amount thereof was payable in United States Treasury notes or funds (commonly termed greenbacks), and that whatever, if anything, the plaintiff might be entitled to recover, the amount thereof should be such sum in Canadian or British currency, as would be equivalent to principal and interest in said notes or funds, allowing credit for the amount endorsed as paid on said instrument. This case was taken down to trial at the sittings of the county court of the



county of Hastings, held at Belleville, on the eighth day of June, under the provisions of the Law Reform Act of 1868, and without a judge's order, under section 4 of 25 Vic. ch. 42. The issues were tried under the 1st sub-section of section 18 of the Law Reform Act, without the intervention of a jury, before the judge of the said county court, who assessed the damages at seven hundred and fifty-three dollars, and fifty-three cents.

*J. B. Read* obtained a summons calling on the plaintiff to shew cause why all further proceedings in this cause on the verdict rendered herein at the recent sittings of the county court of the county of Hastings against the defendant and the entry of judgment thereon, should not be stayed, and the said verdict set aside, on the grounds of irregularity and impropriety in this, that the said cause was tried before the judge of the said county court, without the order of a judge of either of the superior courts of Common Pleas or Queen's Bench that the said cause should be tried in said county court; and on the further ground, that there was no jury process awarded to try the issues, and that the said cause was not one which could be carried down for trial at said court, without a judge's order therefor, or if carried down for trial without an order, that such trial was irregular in having been had before the county court judge without the intervention of a jury.

*H. B. Morphy* shewed cause.

GALT, J.—As respects the first objection, I am of opinion, that the case was not one where the amount was liquidated or ascertained by the signature of the defendant, under the provisions of the Law Reform Act of 1868. It is true that the declaration is on a promissory note, and that by the particulars attached to the record, the plaintiff states his claim to be as follows: note \$900, interest at ten per cent, from 1st March, 1867, \$204.75; but from the terms of the admission above mentioned, it is manifest that the amount stated in the note is only the basis on which the

damages in this case were to be assessed, and did not shew any liquidated or ascertained amount, and the sum due in the present case, as appears from one of the papers filed, was arrived at by calculating \$900 U. S. currency at gold quotation of 141. This case, therefore, was one which should have been taken down by a judge's order, under the 28th Vic. ch. 42, especially as the declaration in this case did not shew the true nature of the claim.

As respects the second objection, namely, that the case was tried by a judge without the intervention of a jury, I am of opinion, that had the case been properly brought before the county court, such an objection could not be sustained. This is a very important question, and, as this is, I believe, the first occasion on which the construction of the Law Reform Act, as regards this point, has been brought up, I have thought it expedient to state my reasons. The first sub-section of the 17th section of the Law Reform Act enacts, that all issues of facts and assessments of damages in the superior courts of common law relating to debt, covenant and contract, when the amount is liquidated or ascertained by the signature of the defendant, may be tried and assessed in the county court of the county where the venue is laid, if the plaintiff desire it, unless a judge of such superior court shall otherwise order. The second sub-section is, "All issues of fact and assessments of damages in actions in any county court, may be tried and assessed at the election of the plaintiff at any sittings of assize and *nisi prius* for the county in which the venue is laid, without any order for that purpose." The other sub-section of section 17 has no bearing on the present question. Section 18 is as follows: "in amendment of the second section of ch. 31, of the Consolidated Statutes of Upper Canada, entitled "An Act respecting Jurors and Juries," (which said second section enacts, that issues of fact shall be tried by a jury, unless otherwise provided,) it is enacted, 1st, that all issues of fact in any civil action, when brought in either of the superior courts of common law, or in any of the county courts of Ontario, and every assessment or enquiry of damages in every such action

may, and in the absence of such notice as in the next sub-section mentioned, shall be heard, tried and assessed by a judge of the said courts without the intervention of a jury, provided that if any one or more of the parties requires such issue to be tried, or damages to be assessed, or enquired of by a jury, he shall give notice to the court in which such action is pending, and to the opposite party, "that he requires a jury." It was contended on behalf of the defendant in the present case, that the foregoing provisions of the first sub-section apply only to cases in which the judge presiding at the trial is a judge of the court in which the action is brought, or, at any rate, that no county court judge could decide any issue of fact in a case brought in one of the superior courts, without a jury.

I cannot agree in this view, because it would have the effect of narrowing to a very considerable extent what was obviously the intention of the Legislature, namely, to avoid the intervention of a jury in all cases where the parties did not necessarily require it. If this construction were adopted, this state of things would arise, namely, that all issues from the county courts brought for trial at any sittings of assize and *nisi prius*, must be tried by a jury, and that the presiding judge at *nisi prius* could try such issues only without the intervention of a jury, as were raised in actions brought in his own court. This construction is so much opposed to what was evidently the intention of the Legislature, that, in the absence of express words, I do not feel myself warranted in giving effect to it.

My judgment is, that as this case is one in which a judge's order was necessary, all proceedings be stayed on the verdict until the fifth day of Michaelmas Term next.

*Order accordingly.*

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## THE QUEEN V. MASON.

*Bail—Power of judge in chambers to rescind order for—New sureties.*

Where a prisoner charged with felony had been admitted to bail upon an order of a judge in chambers, and an application was subsequently made to rescind such order, and to re-commit the prisoner to gaol, on the ground that he had not been committed for trial at the time such order was granted, and also upon the ground that the bail put in was fictitious:

*Held*, that a judge in chambers has power to make the order asked for; but the order in this case was conditional upon the failure of the prisoner to find new sureties within a specified time.

[CHAMBERS, August 16, 1869.]

On the 27th July, *McKenzie*, Q. C., on the part of the private prosecutor *Nichol*, and with the assent of the Attorney General, obtained a summons, calling on the accused, *Mason*, to shew cause why the order made by Mr. Justice Morrison, on the 22nd of May, ordering *Mason* to be admitted to bail for his appearance to answer a charge of stabbing *Robert Nichol* with intent, &c., should not be rescinded, and set aside and vacated, on the ground<sup>se</sup> that *Mason* was not committed for trial by any justice of the peace at the time the said order was applied for and granted, and that there was no warrant against *Mason* for the offence, and that no notice of intention of such application was given to the prosecutor or his counsel, and that the county attorney had no right to consent to the said order, and that the order was improperly obtained, and why the recognizances of bail and the warrant of deliverance under such order should not be set aside, and *Mason* should not be committed for trial, and why he should not furnish the place of residence of *John Patterson* and of *Robert Peck*, the alleged sureties, and the description of the freehold mentioned in the recognizance of bail, and why such order should not be made and such direction given as might be lawful and just in the premises, or grounds disclosed in affidavits and papers filed.

The affidavits and papers filed upon which this application was based shewed that *Mason*, on the 8th of May last, was charged upon an information laid by a police officer, and arrested for a felonious assault upon one *Nichol*, by stabbing



him with a knife which penetrated his lungs : that the case was heard before the police magistrate of Toronto, and witnesses examined for and against the prosecution : that on the 19th May, the police magistrate stated that he had decided upon committing Mason for trial, refusing to take bail, and intimating that Mason would have to apply to a judge : that Nichol, through his counsel, assuming that Mason would be committed, notified the agent for the Attorney General, that he desired to oppose the admission of Mason to bail, and requested to be informed of any application for that purpose : that an application, of which no notice was given to the private prosecutor, was made before Mr. Justice Morrison, sitting in chambers, on the 22nd May, to bail Mason : that an order was granted, admitting Mason to bail, himself in \$600 and two sureties of \$400 each, for his appearance at the next assizes : that the same having come to the knowledge of Nichol, and Mason being at large, an application was made to the police magistrate, to see the order and to inspect the recognizances of bail : that the first was refused, and the counsel of Nichol was referred to the office of the clerk of the peace, where the police magistrate said it was filed : that the same could not be found there, but eventually it was brought and shewn to Nichol's counsel : that by the copy of the recognizance filed, it appeared to have been taken on the 29th May, before the police magistrate, the two sureties being John Patterson and Robert Peck, who are both described as of the township of York, yeomen, and endorsed on which is a memorandum signed by the police magistrate, that both the sureties deposed on oath, that they were freeholders in the township of York, and worth \$400 each, over and above their liabilities : that these sureties are not known and cannot be found. that the assessment rolls for the township of York and village of Yorkville were carefully searched, and no such persons were found entered therein, the same being certified under the hands of the township clerks.

The prosecutor Nichol swore that he had made enquiry, and caused diligent enquiry to be made in the township of York,

and in the village of Yorkville, and elsewhere in the county of York, and that he could not get any intelligence or information whatever about the said John Patterson or Robert Peck : that he had reason to believe, and did verily believe that the names John Patterson and Robert Peck, were fictitious names, or if such persons existed they were obscure and unknown persons without standing or substance, and of no worth whatever ; he also stated that he was informed and believed, that Mason stated since his liberation, that persons of the names of Sheely and McFarlane were his bail.

It appeared that Mason was in custody from the 30th of April until the 29th May, under a warrant of remand, dated 30th April, signed by the police magistrate, a copy of which is filed (the original being produced before the judge in chambers by the officers from the gaol), upon which warrant there were endorsements of further remands to the 14th 19th, 20th, and 21st May, then to the 26th May, to the 27th May, and to the 29th May, then to the 2nd June, and then to the 3rd June : that no warrant of commitment was ever placed in the hands of the keeper of the gaol against Mason, but that he was detained in custody at the time of the application for bail, upon such remanding warrant, and until he was liberated under a warrant of deliverance, signed by the police magistrate on the 29th of May ; and Nichol swore that he was informed by the officers at the gaol, that the warrant of deliverance was brought to the gaol by some person while Mason was there in custody, and that no person was at the gaol to take the recognizance of bail before the delivery of the warrant of deliverance.

Copies of the depositions, &c., taken upon the charge by the police magistrate were also filed. From these it appeared that the information was laid against Mason on the 29th April : that on the 8th May, witnesses were examined, and the case remanded until the 14th May ; there also appeared an entry dated the 19th May, that Mason was committed for trial to the next court ; besides other depositions of witnesses, apparently for the defence, and sworn on the 18th May.

The only affidavit filed on shewing cause was that of Mr. Nudel, clerk of the police court, in which he stated that Mason was committed for trial on the 19th May: that a warrant of commitment was signed and sealed, but not delivered to the gaoler, as there was a counter charge made by Mason against Nichol, in which Mason was a necessary witness: that on the 11th June, Nichol was convicted of an assault on Mason, on Mason's testimony, and that the warrant of commitment against Mason was on that day, to the best of the clerk's recollection, given to a police officer, and that he never saw it since; that since the present application, he procured a duplicate warrant of commitment to be executed by the police magistrate, and placed in the hands of the gaoler.

No affidavit was filed by Mason with respect to the putting in bail, or as to the existence of the sureties, nor any statement made by the police magistrate.

On the return of the summons, the county attorney appeared and made his statement.

*R. A. Harrison*, Q.C., appeared for Mason, and *McKenzie*, Q.C., for the private prosecutor and on behalf of the Attorney General.

MORRISON, J.—On the application to bail, Dr. McMichael appeared for the accused, and the late Mr. Bethune on behalf of the Crown. The county attorney was also in court. The question of bailing was discussed in the absence of the depositions and the warrant of commitment, (they being sent for). I asked the county attorney if the case was a bailable one. He stated the circumstances, and that in his opinion it was. It was then agreed by the counsel that the order to bail should go, and after some discussion the bail was fixed at two sureties in \$400, and the accused in \$600. The depositions and papers were then produced, but as the application was disposed of, I did not look at them. The exact terms in which the order was drawn up I do not recollect. In such orders I generally direct that the bail shall be persons to the satisfaction of the county attorneys, those gentlemen

being responsible officers under the Crown. In this case the order may have been drawn up conditioned that the bail should be to the satisfaction of the police magistrate. As the order or a copy is not produced, I cannot say what the terms were, or whether they were complied with, the prosecutor swearing that he is not able to produce it, the original being in possession of the police magistrate, who refused to give to his counsel a copy of it.

I may here briefly state, so far as the county attorney is concerned, that he accurately stated what took place on the application to bail, and I see nothing to warrant any reflection on his conduct on that occasion, or in reference to any proceeding since the order was made.

When I granted the order to bail I necessarily assumed that Mason was in custody upon a warrant of commitment for trial, and if it had been suggested that he was only in custody on a remanding warrant, from 21st May to 26th May, I certainly would not have entertained the application.

It is, however, contended, and sworn to by Mr. Nudell, that Mason was committed for trial on the 19th May, but that the warrant of commitment was not given to the jailer. It may have been the case, but it is certainly quite inconsistent with the remanding warrant and the indorsements thereon. I may state that I noticed on the original remanding warrant a memorandum that the prisoner was committed for trial under date of the 19th May, which memorandum is struck out with the pen, and then follow the further remands after that date to the 3rd June. The recognizance of bail appears to have been acknowledged on the 29th May, the warrant of deliverance being dated the same day. No sensible explanation is given to account for these inconsistencies and irregularities, except that which is stated in Nudell's affidavits; but it seems very inconsistent, after a prisoner has been committed for trial on the 19th May on a charge of felony, to remand him on the same charge from time to time until the 3rd June; and although he was bailed and released from jail on a warrant of deliverance on the 29th May, that a warrant of commitment against the same prisoner for the



same charge should afterwards issue on the 11th June, and be placed in the hands of a police officer, and that all these proceedings should take place under the direction of the same magistrate; and it further appears that since this application a duplicate warrant of commitment has been signed and sent to the keeper of the jail. These matters, in conjunction with the alleged fictitiousness of the bail, in the absence of any satisfactory explanation, gave occasion on the argument for severe comment; and I regretted much that the police magistrate did not think it necessary, in justice to his official position, to account for these irregularities, and repel the imputations involved. On the other hand, Mason, the accused, in the face of an intimation from the prosecutor's counsel, that if the bail were produced, or if it was shewn by affidavit that the sureties were the persons they were represented to be, that this application would be abandoned, refuses through his counsel to file any affidavit. Under such circumstances, and as the case stands, I can only arrive at the conclusion that the bail are as alleged and sworn to, fictitious or worthless. I am asked by this summons to set aside my own order. I am clearly of opinion that I might do so, as the order was based on the assumed fact that the accused was then in custody on a final warrant of commitment, and which it now turns out was not the case, and the order was inadvertently and improperly granted, and for that reason alone I would be justified in rescinding it. But after reading the depositions, and assuming that the accused was in fact committed for trial as stated by Nudell, the case in my opinion is a bailable one, and the amount of bail fixed sufficient; and if I were now satisfied that the sureties were *bonâ fide* and not as charged, I would dismiss the application; but when it is alleged that this order, which I ought not to have granted, has been improperly used as an authority and cover to liberate the accused, I should be wanting in my duty if I did not direct such steps to be taken as would in some measure remedy the mischief, and insure justice being done in the premises.

Blackstone in his Commentaries, Vol. 4, p. 296, in treat-

ing of commitment and bail says: "Bail is a delivery or bailment of a person to his sureties upon their joining together with himself in sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail," and "he that is bailed is, in supposition of law, still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him in at any time: " 2 Hawkins, P. C. 124. Such being the law, assuming that the bail in the present case are, as alleged, fictitious, then in reality Mason would be at large; in such a case there must be some remedy. It was denied on the argument that I had any authority to prevent so scandalous an evasion of the law, and that for my doing so no precedent could be found. The absence of precedent can only be accounted for from no case of the kind having arisen, but if it were so, I would not hesitate to make a precedent; but I am not without authority, for it is laid down in 2 Hawkins, 88, and referred to in 2 Hale P. C. 125, and in Bacon's Abridgment, Title, Bail (in criminal cases), (F.), that "if a person be bailed by insufficient sureties he may be required either by him who took the bail, or by any one who hath power to bail him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none."

If that is law, and on principle and common sense it is, then in this case, where it is sworn that the bail are fictitious and utterly worthless,—a conclusion which is borne out by the refusal of the accused to state who they are, or where they are to be found, or that they have any existence—I shall require the accused Mason to find other sureties, and in case of his neglecting or refusing to do so, shall order him to be recommitted for the offence with which he stands charged. An order will therefore go, that Mason do within four days put in good and sufficient bail before myself in Osgoode Hall, viz., himself in \$600, and two sureties in \$400 each, otherwise he shall be recommitted to the custody of the keeper of the common jail of the city of Toronto.

*Order accordingly.*

## IN RE ROBERTSON, ET AL.

*Affidavit—Attorney—Demand of costs.*

The *jurat* of an affidavit stated that it was sworn on a day which had not then arrived. *Held*, that the affidavit was defective and a nullity. *Thompson v. Billing*, 11 M. & W. 361, remarked upon; the practice therein allowed as to proceeding on a demand of money from the town agent for a country attorney without giving time for correspondence between them thought to be unreasonable.

[PRACTICE COURT, Easter Term, 1869.]

During last term *W. Sidney Smith* obtained a *rule nisi*, calling on one Fentin, or his attorney, to shew cause why a rule granted herein in Michaelmas Term last, ordering a certain judge's order to be made a rule of court, with costs to be paid by the attorney, should not be rescinded in so far as the same orders payment of costs by the attorney, on the ground that no disobedience of the terms of the judge's order was shewn by any affidavit filed in moving said rule, as required by the practice, and that in fact there was not any disobedience of said order.

*J. A. Boyd* shewed cause.

*Smith*, contra.

MORRISON, J.—It appeared that a judge's order made by myself was obtained on the 10th May, 1868. to refer to taxation, certain bills of cost of the attorney against one Fentin: that the master taxed the bills and made his report on the 5th February, 1869, and certified that there was a balance of \$98.21 of moneys received by the attorney due to Fentin, and that he had taxed the costs of the reference to Fentin at \$40.47, and he certified that both these sums, in all \$138.68 were to be paid to Fentin: that on the 9th February the judge's order was made a rule of court and was drawn up with costs of and incident to the application for the rule, to be paid by the attorneys to Fentin, and was served on the same day, and that the application was an *ex parte* one. It also appeared that after the rule of court was served a notice

to tax the costs under it was served on the agents of the attorney for the 24th February, on which day it was arranged that the taxation should proceed: that on the morning of that day, one of the agents of the attorneys attended, and the master made his allocatur, certifying that he had taxed the costs of the rule of court of the 9th February, to be paid by the attorneys, at £4 11s. 9d.: that no objection was made to the taxation, but that on the same day a judge's summons to stay proceedings was obtained, and afterwards an order was made for a stay until this term, with a view to this application. That order was based on an affidavit of one of the attorneys, now refiled on this motion, stating that the attorneys were not aware nor had notice of the judge's order being made a rule of court until after the rule issued: that there was no intention on their part to disobey the judge's order, and that as soon as they were aware of the service of the master's certificate, they telegraphed to their agents to pay the amount, which was done.

One question which arises on this rule is the sufficiency of one of the affidavits filed on the motion to make the order a rule of court, to entitle Fentin to have it made part of the rule that the costs of making the judge's order a rule of court should be paid by the attorneys, under the authority of the proviso to the 129th rule of practice. In this case it was necessary, in order to shew disobedience, that the master's certificate should have been served, and the money found due to Fentin demanded and payment refused. Now the affidavit which states such service and demand is defective in the jurat, as it sets forth that it was sworn on the 9th day of December, 1869, a day not yet arrived; the service and demand being stated in the body to be made on the 8th February, 1869. If this affidavit could not have been read, then the application did not comply with the proviso of the 129th rule, which requires an affidavit to be made and filed of service of the order on the party, or his attorney or agent, and that it was disobeyed: *Duke of Brunswick v. Slowman*, 8 C. B. 617; *Cobbett v. Oldfield*, 16 M. & W. 469; *Blackwell v. Allen*, 7 M. & W. 146; *Frost v. Hayward*, 10 M. & W. 473; *Pardoe v. Territt*, 5 M. & G. 291.



On examining the various authorities and considering the strictness which the courts require in relation to affidavits, I am of opinion that the jurat of the affidavit in question is so defective as to render it a nullity, and on this ground alone this rule must be made absolute, as in that case the application did not come within the proviso of the 129th rule. If the state of the jurat had been brought under the notice of the court at the time, it could not have been read, and being an *ex parte* application it was the duty of the party moving to see that his motion was based on proper and sufficient materials.

Compelled as I am to arrive at this conclusion in this case, I do so without regret, for I cannot help seeing that the making the judge's order a rule of court immediately after the service of the master's certificate and demand by a clerk or the attorneys' agents to pay \$139, who replied they would immediately write to the attorneys, whom, they had no doubt, would comply with the demand, was, to say the least, rather precipitate, and made with a view to make and mulct the attorneys in unnecessary and vexatious costs.

I do not apply these remarks to the Toronto agents of Fentin's attorneys, for what was done was under the direct instructions of Fentin's attorneys. It was contended that, assuming that the demand was made on the Toronto agents on the 9th of February, that the nonpayment of the amount on such demand did not entitle Fentin to the costs of the rule, as it did not shew a disobeying of the order—that, in fact, it was not disobeyed, as the attorneys had not in fact notice. My own opinion is, that it is unreasonable to hold that a demand so made, without some time being allowed to communicate with the principal, should entitle the party to the costs of the rule as for a disobedience of the judge's order; but I am bound by the decided cases, for in *Thompson v. Billing*, 11 M. & W. 361; *Chitty's Arch.* 1595, 11 ed., it was so held. I think it more reasonable that the rule of practice should allow, when the demand is on the town agents and not on the principal, an interval of some few days to elapse after a demand for money, to amount to disobedience, so

as to entitle a party to the costs of making the order a rule of court. The members of the profession, I think, will concur that it is rather a delusion to assume that the agents are at all times provided with funds to meet any demands that may be made on them for their principals. Several objections were taken to the application by Mr. Boyd as to laches on the part of the attorneys by delay in moving against the rule. I see none, neither do I think that the attendance of the attorneys' agents at the taxation of the costs was any waiver of the objections to the rule. If they had not attended, the objection would be equally tenable; it was merely watching a proceeding which they could not stay without a judge's summons, which they obtained the same day.

The rule will be absolute to rescind so much of the rule as orders payment of the costs of the rule, but under the circumstances without costs.

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### THE QUEEN V. ALBERT SHARP.

*Jurisdiction of magistrates on the great lakes of Canada.*

*Held*, that the great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and therefore any magistrate of this Province has authority to enquire into offences committed on said lakes, although in American waters.

[CHAMBERS, September 1, 1869.]

*C. S. Patterson*, obtained a writ of *habeas corpus* on behalf of the defendant, directed to the keeper of the common jail of the county of York, and to the chief constable of the city of Toronto.

The keeper of the jail returned that he detained the defendant under the following warrant :

CANADA, PROVINCE OF ONTARIO, <i>City of Toronto,</i> <i>To wit :</i>	}	"To the chief constable or other police officer of said city, and to the keeper of the common jail in the said city.
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Whereas Albert Sharp and John Connor were this day

charged before the undersigned, police magistrate of the said city, for that they, the said Albert Sharp and John Connor did, on the first day of July last, 1869, unlawfully and maliciously scuttle, sink, and destroy, on Lake Erie, the barque "Garry Owen," of the city of Toronto, being a British vessel, and British built, and being assisted in such felony by James Hughes, the captain of said vessel, contrary to law. And it appears to me to be necessary to remand the said Albert Sharp and John Connor. These are therefore, &c.,

A. MACNABB, *P. M.*"

*L. W. Smith*, on behalf of the prosecution, and as representing the insurance company alleged to have been attempted to be defrauded by the defendants, obtained a *certiorari* to the police magistrate to bring up the information and proceedings laid and taken against the defendants.

The information was made on the 21st of August, by Frank Jackman, marine inspector of the Montreal Assurance Company, before the police magistrate. The informant stated that from enquiries made by him in his capacity of marine inspector from the best and most reliable sources at his command, he firmly believed that the barque, "Garry Owen," of the city of Toronto, was on the night of the 1st of July last, unlawfully and maliciously destroyed by scuttling on Lake Erie, with intent thereby to prejudice and defraud the Montreal Assurance Company, which had an insurance at the time upon the said vessel and cargo then on board the said vessel, and that Albert Sharp and John Connor, who were at the time seamen on board of the said vessel, were accomplices with the captain of the said vessel, James Hughes, in the destruction of the said vessel, or were aiding or abetting therein: that the said Albert Sharp and John Connor were British subjects, and that the said vessel was a British vessel and British built.

Annexed to the information was the deposition of Mary Ann Dollinson, who was cook on board the vessel at the time of her sinking. She stated some circumstances of suspicion against the defendants.

*C. S. Patterson*, for the defendant, contended that the

warrant and proceedings were insufficient to justify the arrest or detention of defendant. No offence is charged under the Con. Stat. of Canada, ch. 93, sec. 9. The police magistrate has no jurisdiction. The offence is stated to have been committed on Lake Erie. The offence was therefore committed in this Province or in the United States. If in the United States, it is clear the police magistrate had no jurisdiction; if in this Province, then the jurisdiction belongs to the townships respectively fronting on the lake: Con. Stat. U. C. ch. 3, sec. 5; and all of these townships are beyond the jurisdiction of the police magistrate; the Merchant Shipping Acts of 1854, 17 & 18 Vic. ch. 104, sec. 520, and of 1855, 18 & 19 Vic. ch. 91, sec. 21. The act of 1855, applies only to British ships, and to offences on the high seas. Lake Erie is not the high sea, Con. Stat. U. C. ch. 3, sec. 5. The act of 1854 applies only to offences committed under that act.

The Imperial Act, 12 & 13 Vic. ch. 96, sec. 1, recognizes the distinction between the sea and colonial waters.

If the offence can be said to have been committed on the sea, the jurisdiction belongs to the admiralty: Con. Stat. C. ch. 99, sec. 131.

*L. W. Smith*, for the prosecution. The charge is made under Con. Stat. C. ch. 93, sec. 9, and is in the language of the statute. The Dominion Act, 31 Vic. ch. 72, provides where felonies may be adjudicated upon, and this case comes within sec. 8. The proceedings shewed that the defendants were British seamen and the vessel British built. Sec. 529 of the Merchant Shipping Act applies.

ADAM WILSON, J.—All I have to decide at present is whether the facts as to the place where the act alleged occurred, and the vessel upon which the act was done, and the persons by whom it is said to have been done, are all so plainly settled that, and if so, whether, they can in any way support the charge against the defendants which has been laid against them.

If the undisputed or admitted facts shew beyond all question that no prosecution can be maintained, the defendants



should be acquitted at once. An investigation could lead to no result which would justify detention.

But if the facts are not plainly brought out, and, upon the case as it stands, the defendants may or may not be criminally responsible here, I should not discharge them even although the written proceedings shew no clear case against them, for, as they may be arrested on mere suspicion in case of felony without information or warrant, I should not discharge them until an investigation shewed whether their arrest and detention were justifiable or not. I should remit the matter to the magistrate.

By Con. Stat. C. ch. 93, sec. 9, it is enacted, that if any person unlawfully and maliciously sets fire to, casts away, or in anywise destroys any ship or vessel with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board of the same, or the underwriter of any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, such offender shall be guilty of felony, &c.

The proceedings shew that a barque, British built, and owned in the city of Toronto, is suspected to have been unlawfully and maliciously destroyed on Lake Erie by the defendants as participators in the act; such intent being to prejudice and defraud the Montreal Assurance Company, which had an insurance at the time upon the vessel, and the cargo then on board.

The proceedings also shew that the defendants are British subjects, and were seamen on board the vessel at the time. A *primâ facie* case is stated according to the statute.

The question then is, what is the effect of the statement that the act was committed on Lake Erie, without defining whether it was done in British or in American waters?

By Imp. Act, 12 & 13 Vic. ch. 96, sec. 1, authority is given to proceed for offences committed on the sea, or in any haven, river, creek, or place, where the admiral has power, authority, or jurisdiction. Has the admiral power to proceed for this offence committed on Lake Ontario?

In *Rex v. Allen*, 7 C. & P. 664, the prisoner was indicted

for stealing three chests of tea from a vessel which sailed from London on the high seas, when the vessel was lying off Wampa in China. The vessel lay twenty or thirty miles from the sea. No evidence was given as to the flowing of the tide or otherwise at the place where the vessel lay.

It was contended for the prisoner that the larceny was not committed on the high seas, and was within the jurisdiction of the central criminal court. The point was reserved.

Mr. Justice Williams, who delivered the judgment, said, "The tea was stolen on board the 'Aurora' which had crossed the ocean, and the judges were of opinion that there was sufficient evidence."

In *Rex v. Allen*, 1 Moo. C. C. 494, it is said, "the place being one where great ships go."

Where the sea flows in between two points of land in England, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within that line, though it is said the admiralty has concurrent jurisdiction within such line: *Rex v. Bruce*, R. & R. 243.

But if the robbery be committed on lakes, harbours, ports, &c., in foreign countries, the court of admiralty indisputably has jurisdiction.

We know as a fact that vessels have left the great lakes of this country for foreign countries, along and across the ocean, and that vessels have come from the ocean to our lakes. We also know that her Majesty's war ships have come from the ocean to these lakes. We may therefore say these lakes are places where great ships go.

By the Merchant Shipping Act, 1854, sec. 261, the officer of such a war ship might, on these lakes, act as the member of a "naval court."

The case of the steamer "*Black Hawk*," which was seized on the St. Lawrence at Ogdensburgh, far above tide water, for infraction of the navigation laws of the United States, was a case of admiralty jurisdiction: 1 *Kent's Commentaries* p. 400 note (1) 8th ed.; 11th ed. p. 367.

The case of *Parker v. Elliott*, 1 C. P. 470, and *Gage v. Bates*, 7 C. P. 116, determine "that the rule of the common law as to the flux and influx of the tide being necessary to constitute a body of water a navigable river," does not apply to a case like the present, and that these great lakes are not to be considered in the same light as the small inland streams in England.

As there is English authority that a place in a foreign country where great ships go, although beyond the tide water, is within the admiralty jurisdiction, and as our own courts have decided that the lakes here are not governed by the law applicable to the small waters in England, and some of the American courts have decided that there is admiralty jurisdiction over the waters of the St. Lawrence and of Lake Ontario, and as war ships have come here from the ocean, and there is an oceanic communication to and from these lakes, I have come to the conclusion that Lake Erie is a body of water on which the admiralty jurisdiction extends and that by the Imperial Act 12 & 13 Vic. ch. 96, there is authority in our courts and magistrates to take cognizance of the offence, although committed in American waters, and the power may be exercised by all magistrates in the colony as if the offence had been committed on the waters within the limits of the colony and within the limits of the local jurisdiction of the courts of criminal justice of the colony.

I do not see anything in the statute which gives any particular functionary jurisdiction, or which makes the offence of a local nature, and I am not prepared to say the police magistrate of Toronto has not as much authority to enquire into the offence as any other magistrate in any other part of the Province.

I therefore remand the defendants for the purpose of further enquiry.

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## MORRIS V. LESLIE.

*Prochein amy*—Security for costs.

1. An application to remove the next friend of an infant plaintiff on the ground of insolvency, or to stay proceedings till security for costs is given, must be made promptly after declaration served, according to the rule in ordinary cases when security for costs is applied for.
2. When the court has appointed the natural guardian of an infant as next friend, and it appears probable that no one else can be found to act in time for the assizes, and no imposition has been practised upon the court in making such appointment, such next friend will not be removed nor will he be ordered to give security for costs, although in destitute circumstances.

[CHAMBERS, September 21, 1869.]

An order was made on the 1st September, 1869, to admit Margaret Morris, mother of the plaintiff, to prosecute the action as her next friend. This order was served on defendant's attorney along with the declaration on the 4th September. After allowing the time for pleading to expire the defendant obtained a summons to plead several matters, upon which an order was obtained on 16th September. The pleas were served on the 18th September, and on the same day issue was joined and notice of trial was served just in time for the Belleville Assizes.

On the 21st September the defendant obtained a summons calling on the plaintiff to shew cause why the appointment of the above named *prochein amy* should not be revoked, and why all proceedings herein should not be stayed until a responsible person be appointed as *prochein amy* in her stead, or why all further proceedings herein should not be stayed until such next friend should give to the defendant security for his costs herein; upon the ground that the said *prochein amy* is not a responsible person, and not in solvent circumstances, and not good for defendant's costs herein.

*J. A. Boyd* shewed cause. He filed affidavits detailing the proceedings, and in which it was alleged, that compelling the plaintiff to give security for costs would be equivalent to preventing her from prosecuting the action, and that in any



event she could not get such security in time for the approaching Assizes. He contended,

1. That the delay in making the application had been too great: See Rule of Court, No. 23, *Harrison's C. L. P. Act*, 603; *Fogo v. Pypher*, 3 P. R. 309; *Somers v. Carter*, *ib.* 328; *Adshead v. Upton*, 22 U. C. R. 429; *Torrance v. Gross*, 2 Prac. R. 55; *Morgan v. Hellems*, 1 Prac. R. 363; *Wainwright v. Bland et al.*, 2 C. M. & R. 740, (*per Alderson*, B.)

2. Insolvency of the *prochein amy* is not established here, and even if established, she is the natural guardian, and no other person can be had to act: *Lees v. Smith*, 5 H. & N. 632; *Adair on Costs*, pp. 10, 11; *Watson v. Frazer*, 8 M. & W. 660; *Morgan & Davey on Costs*, 254; *Duckett v. Satchwell*, 12 M. & W. 779.

The following authorities were cited in support of the summons: *Arch. Prac.* 12th ed., p. 1242; *Lees v. Smith*, 29 L. J. Ex. 294; *Mann v. Berthen*, 4 Moo. & P. 215.

GALT, J.—The summons must be discharged on both grounds.

*Summons discharged.*

### WALLACE V. ACRE.

*Ejectment—Vacant possession—Setting aside writ.*

A writ of ejectment was issued against the defendant, who (as was alleged by the plaintiff and not denied by the defendant) claimed to be owner of the land in question. The possession was vacant, and it was not shewn that the defendant was last in possession.

*Held*, that the defendant was entitled to have the writ set aside without disclaiming title.

[CHAMBERS, September 23, 1869.]

This was a summons calling on the plaintiff, amongst other things, to shew cause why the writ of summons in ejectment herein, copy and service thereof, and præcipe therefor, or some or one of them, should not be set aside

with costs, on the ground that said defendant was improperly made a defendant.

The facts antecedent to the bringing of this suit appear in *Livingstone v. Acre*, 15 Grant, 610, and *Acre v. Livingstone et al.*, 26 U. C. R. 282. The defendant in this suit had brought an action of ejectment against the plaintiff and the said Livingstone, to which they appeared, Wallace limiting his defence to one half and Livingstone to the other half. An order was subsequently made directing these appearances to be withdrawn, and giving Acre leave to sign judgment. Wallace neglected to withdraw his appearance as directed, and Acre took no steps to obtain judgment, or to take possession of the land which was offered to him. It consequently remained vacant, at least so far as concerned the fifty acres claimed by Wallace.

Many other facts appeared on the affidavits and were discussed, but were not material to the point on which the case turned.

*O'Brien* shewed cause :—

1. So long as a defendant is either in possession of or claims any interest in the land, the writ against him cannot be set aside; and he does not now, as he should do to make out his case for relief on this application, disclaim title or interest: *Hall v. Yuill*, 2 Prac. R. 242; *D'Arcy v. White*, 24 U. C. R. 570; and see *Kerr v. Waldie et al.*, 3 U. C. L. J., N. S., 292, 4 Prac. R. 138.

2. The writ may properly be directed to the person "entitled to defend the possession of the property claimed," even though he be not in actual possession: Ejectment Act, secs. 1, 2. And the writ need not now be directed, in case of a vacant possession, to the person last in possession, as was the law under 14 & 15 Vic. cap. 114, sec. 1.

*J. A. Boyd*, contra :—

The writ should have been directed, this being vacant land, to the person last in actual possession: *Street v. Crooks et al.*, 6 C. P. 120; *Benson v. Connor*, *Ib.*, 359; and the writ not being addressed to the tenant in

possession is irregular: *Thompson v. Slade*, 25 L. J. Ex. N. S. 306.

The sole question to be determined in ejectment is, who is entitled to the possession, without regard to the manner in which he has entered: *Robinson v. Smith*, 17 U. C. R. 218.

RICHARDS, C. J.—I cannot hold that a person can be compelled to defend an action brought to recover possession of land of which he is not at the time in possession, even though he may claim to be the owner of it. Of course if he does not desire to litigate, he need not appear, but then he makes himself liable for costs in an action for mesne profits. Possession in this case appears to be open to either party, but neither seems to be desirous of taking it.

I think the order should go, but as the conduct of the defendant does not appear to me to be what it should have been, looking to all the facts as they appear from the affidavits, the order will go without costs.

*Order accordingly.*

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### SUMMERVILLE V. JOY ET AL.

*Notice of trial by proviso—Irregularity or nullity.*

The defendant having given notice of trial by proviso, claiming that the plaintiff had made default in not proceeding to trial within due time after a new trial had been ordered—the question, whether there had been, under the circumstances, a default such as to enable the defendants to give this notice, considered, but not decided.

*Quære*: whether notice of trial by proviso has been abolished in this country.

[CHAMBERS, October 1, 1869.]

*W. Sidney Smith*, for the plaintiff, obtained a summons to set aside a notice of trial by proviso, under the following circumstances:

The venue in this cause was laid in the County of Brant. The action was commenced on the 19th of March, 1868 and was tried on the 21st April, 1868, when a verdict was rendered for the plaintiff, for one thousand dollars damages.

The defendants moved for and obtained a rule absolute for a new trial on payment of costs in Hilary Term last, about the 6th day of March. The costs were taxed and paid by the defendants on or about the 10th day of April last, in time to let the plaintiff go to trial at the next assizes if he should so desire. Only one assize was held for the county of Brant since that date, namely on the 26th day of April.

On the 20th day of September last, notice of trial by proviso and issue book were served, but no other proceedings were had in the cause since the payment of the said costs, nor did the defendants give any twenty days' notice to the plaintiff to proceed, nor did they obtain any rule of court enabling them to proceed with the trial of this cause.

The plaintiff alleged that it was his intention to proceed to trial at the next Brant assizes, if he could procure the attendance or evidence of a witness that he said was material and necessary.

The grounds of irregularity mentioned in the summons were:—1st. That no twenty days' notice was given by defendants, or either of them, to the plaintiff to proceed to trial.

2nd. That a trial having been once had, no such notice could at present be given to plaintiff.

3rd. That the costs, upon payment of which defendants obtained a new trial, were only paid in vacation preceding Easter Term last, and the plaintiff had the same time to proceed as if issue were then joined, and no assize had passed since Easter Term, this cause being a country cause.

4th. That no notice of trial could be so given until the plaintiff was in default under section 217 of the C. L. P. Act, and he was not so at the time of such service; and plaintiff, not having up to the present time neglected either to give notice of trial, or to bring the cause on to be tried at the



assizes following said Easter Term, is not subject to such notice to proceed, or of trial, or notice of trial by proviso.

The summons also called on the defendants to shew cause why the time for proceeding to trial herein should not be extended over the present ensuing assizes for the County of Brant, to the next spring assizes for said county, on the grounds of the absence of a necessary and material witness for the plaintiff, and the impossibility of procuring his evidence by commission or otherwise at the next assizes; or why such order should not be made for the relief of the plaintiff, as to said presiding judge might seem meet, on grounds disclosed in affidavits and papers filed.

*J. A. Boyd* shewed cause. The defendants were entitled to give notice of trial by proviso, owing to the lapse of time since issue had been joined, and for the default of the plaintiff in not having gone to trial at the spring assizes, as he might have done.

*Smith, contra.* There was no default, as the case had been once tried, and the defendants could not proceed either by proviso or twenty days' notice. In any case they were not bound to go to trial before the fall assizes.

The cases cited are referred to in the judgment of,

GWYNNE, J.—By the Imperial Common Law Procedure Act, 1852, sec. 116, it is enacted that “nothing herein contained shall affect the right of a defendant to take down a cause for trial after default by the plaintiff to proceed to trial, *according to the course and practice of the court.*”

The 42nd rule of H. T. 1853, in England, establishes the practice of the court thereafter to be that “no trial by proviso shall be allowed in *the same term* in which *the default* of the plaintiff has been made, *and no rule for a trial by proviso shall be necessary.*”

Our statute has no section similar to the 116th section of the Imperial Act, and the 227th section, which makes a provision in substitution for the abolished practice, of moving for judgment as in case of a nonsuit, makes statutory what was provided for by rule 42 of H. T. 1853, in England, for

it enacts that no rule for trial by proviso shall be necessary. Why there should be this difference between the two acts is not apparent. If our statute contemplated abolishing trial by proviso altogether, and making the 227th section a substitute for that also, one would suppose that instead of abolishing the *rule* for a trial by proviso, they would have abolished the trial by proviso itself.

It would seem that our courts do not consider that the trial by proviso is abolished, for we have also a rule which is in the words of the statute, that "no rule for trial by proviso shall be necessary."

In *Chitty's Archbold*, 11th ed., p. 1488, it is said, "it would seem that after the plaintiff has once tried the cause, he cannot be compelled to proceed to trial under the new Act," that is, under the clause in C. L. P. Act of 1852, similar to our 227th clause. No case is cited there in support of that dictum, but *Oakely v. Ooddeen* 11 C.B., N.S. 805, has been cited to me as supporting it. The case does not so decide in terms. The point did not precisely arise, and in fact, in one stage of the cause, notice had been given as if the section did apply, but upon its being given, the plaintiff also gave notice of trial, and the case was taken down, but went off for want of a jury, and the plaintiff took the case down for trial again, when the jury, being unable to agree, were discharged. What the case does decide is that where the plaintiff is not in default, there can be no trial by proviso, and that the plaintiff was not in default there, for he had taken the case down to trial, and it was no fault of his that a verdict had not been rendered. Mr. Smith dwelt strongly upon the language of Byles, J., in that case, viz.—"where a new trial is ordered, the plaintiff is *in the same position* as to proceeding to a second trial, as he was when issue was first joined." Mr. Smith upon this contended that after a new trial was ordered, the plaintiff had the *same time* to go down to trial from the granting of the order as he had from joining issue, and the marginal note of the case supports this view. I think all that Byles, J., meant is explained by the next sentence in his judgment,

that the plaintiff must, after the new trial is granted, "be guilty of a default before the defendant can interpose, &c." I think, however, that there is good ground for contending, from the terms of the 227th section of our act, that it does not apply to a case where there had been a trial—that is the conclusion which I think would be arrived at in England, upon the similar clause in the Imperial Act; but the Imperial Act specially preserves the practice of trial by proviso, which our act does not; and it may be contended that the omission in our act is intentional and that the trial by proviso as well as judgment in case of a nonsuit is abolished, in which case our 227th clause must apply to a case where a new trial has been ordered, or the defendant will be without remedy. If I should decide now that trial by proviso is done away with, and that the defendant must proceed by a notice under the 227th clause, he could only obtain redress by appealing, and in the meantime he would be deprived of the right which is his, of proceeding to trial by proviso, if that mode of trial is not done away with; whereas, if it is done away with, the plaintiff can as effectually move after the nonsuit, if the plaintiff should suffer himself to be nonsuited, as now. If the 227th section does not apply where there has been a trial, then the time which by that section must elapse before the defendants can give the notice, is not the time which must elapse before he can give notice of trial by proviso, if that mode of trial still exists, unless that be also the time which must elapse according to *the practice of the court*, independently of this section, before the plaintiff is in default. Here an assize has elapsed since the new trial was ordered, and since the costs by the rule granting the new trial ordered to be paid have been paid. *Oakely v. Ooddeen* does not decide, and no case has been cited to me which does decide, that the suffering that assize to elapse is not a default which entitles the defendants to proceed to trial by proviso, if that mode of trial is not abolished. The case of *The Staffordshire &c. Canal Company v. The Trent and Mersey Canal Company*, 5 Taunt. 557, seems to imply that such a

default does entitle the defendants to give notice of trial by proviso. I am not prepared to say that this mode of proceeding is abolished. I am not prepared to say that the defendants can and must proceed by a notice under the 227th section. I shall not therefore pronounce the service of the notice of trial to be an irregularity. I shall leave the plaintiff to elect whether he will proceed or not with the trial and move against a nonsuit, if that should be the result. It is a point proper for the court to determine, and I shall not make an order which might probably deprive the defendants of what might prove to be their right. The defendants may proceed at their own risk of having their proceeding set aside by the court, if it should be of opinion that the trial by proviso is irregular, for if irregular the irregularity, as it appears to me, is one constituting a nullity.

As to that part of the summons which asks, as an alternative, to put off the trial—upon the present material I cannot grant it, because the plaintiff swears that he intends to proceed to trial himself at the next assize, if he can get the witness spoken of; it may be that he will get him—and if he cannot get him, and if the plaintiff cannot proceed to trial without him, the plaintiff can renew his motion to put off the trial before the judge at *Nisi Prius*; but while there is acknowledged to be a doubt whether he can be got or not, I should not, I think, put off the trial absolutely.

The proper order I think to make, under the circumstances, will be to discharge the summons without costs, leaving the parties to determine what course they will respectively pursue, and leaving to the court the question which this motion raises, and which is new in practice. If the plaintiff should resolve to let the defendants proceed, and should suffer a nonsuit, he can, when moving against the nonsuit, appeal against my order, if he thinks his omitting to do so can in any way prejudice his right to move to set aside the nonsuit. If the plaintiff should get his witness, he may himself, if he pleases, give notice of trial; or if he cannot get his witness he can, if he pleases, renew his motion to put off the trial.

*Order accordingly.*



## DAVIS V. WELLER.

*Staying proceedings until costs of former action paid.*

An action was prosecuted to trial in the name of a plaintiff, who was dead before the commencement of the suit, but of this the attorney was ignorant, the action having apparently been brought under a mistake of facts. The death of plaintiff being shewn at trial, the record was struck out by the judge. An action was subsequently brought for the same cause by the parties properly entitled to sue. *Held*, that this action was not vexatiously brought, so as to entitle the defendant to stay proceedings in such second action until the costs of the first were paid.

[CHAMBERS, October 16, 1869.]

An action was brought by Hosea B. Smith and William B. Smith, partners in trade, against the present defendant.

The plaintiff Hosea B. Smith died between writ and declaration, and the suit was continued in the name of William B. Smith, as surviving partner.

The case was brought down to trial at the last Lindsay assizes, but before the jury were sworn the defendant discovered that the plaintiff William B. Smith had been dead for some years. The judge thereupon declined to try the cause, and struck out the record.

The instructions for this action had been given by one William R. Smith, who had some connection with the firm, and who, as was contended on the part of the plaintiff in the proceedings hereafter referred to, had acted *bonâ fide*, though under a mistake as to the facts or as to the names in which the suit should be brought; but it was urged on the part of the defendant that he had attempted to personate William B. Smith, taking advantage of the similarity of the names.

An action was subsequently brought by the same attorney for the same cause of action as the former suit, in the name of the now plaintiff as the representative of the said Hosea B. Smith, as surviving partner of said firm. The defendant thereupon obtained a summons calling on the plaintiff to shew cause why all proceedings should not be stayed until the costs in the former action of *Smith v. Weller* should be paid, and until security for costs should be given, on the ground that the plaintiff resided in Montreal.

*W. Sidney Smith* shewed cause.

*Hector Cameron* supported the summons.

HAGARTY, C. J., C. P.—I am of opinion that the suit of *Smith v. Weller* was carried down to the Lindsay assizes in good faith, although clearly under a mistake. At these assizes the fact of plaintiff's death was discovered. Whether after such discovery William R. Smith acted in good faith or not does not affect my judgment. The learned judge declined to try the case, and it was struck out. There was no trial on the merits, and no legal determination of the suit. I think the security for costs in that suit must be practically unavailing to defendant. The subject is much discussed in *Hoare v. Dickson*, 7 C. B. 177. Wilde, C. J., says, "Where a party has brought an action and has had an opportunity of trying that action upon the merits, and has either failed upon the merits, or has withdrawn his case, and afterwards brings a second action for same cause, leaving the costs of the first action unpaid, the court will interpose its authority to prevent him from so harassing his opponent." Maule, J., says (p. 176), "Can you find any case where a second action has been allowed to proceed after a decision upon the merits has been had and acquiesced in?" Counsel said, "There was no decision upon the merits here, the plaintiff was nonsuited." Maule, J., "Not upon a technical objection." In fact the nonsuit was upon the merits. *Melchart v. Halsey*, 3 Wils. 149, and 2 W. Bl. 741, there cited is to same effect.

The late case of *Cobbett v. Warner*, L. R. 2 Q. B. 108, I think bears upon the same distinction as to whether the merits were tried in the first action; see the judgment delivered by Mellor, J., where he discusses the nature of the nonsuit in the first action.

As I am compelled to dispose of this motion to-day, I have been unable to refer to some of the authorities cited. In a note to 2 *Archbold's Pr.* 1298, reference is made to *Dawson v. Sampson*, 2 Chit. 146, where the proceedings in the first action were set aside for irregularity, and the court refused to stay the proceedings in a second action; see also *Liversidge v. Goode*, 2 Dowl. P. C. 141.

In *Harrison's C. L. P. Act*, 448 (1st ed.), it is said in a note, "But a limitation of the practice is, that it is only exercised in cases where the previous ejectment has been tried, and not where the plaintiff in such previous ejectment abandoned his suit before trial, because in such cases there is little vexation and very little expense." Three of the cases cited seem hardly to support this distinction. I have not had time to refer to *Doe Blackburn v. Standish*, 2 Dowl. N. S. 26, and a manuscript case of our own courts.

I decide the case on the general view of the law in *Hoare v. Dickson*, recognized in *Cobbett v. Warner*.\* I do not feel warranted on the state of the authorities, so far as I have had time to examine them, to stay proceedings, as asked, till the payment of the costs of a suit, never tried or withdrawn by act of plaintiffs, nor by his attorney, determined and instituted, as I believe, in good faith, and only becoming unavailing in consequence of a mistake which destroyed (as it were) the whole proceeding as soon as discovered.

But I think the defendant is on other grounds entitled to security for the costs of this action, and proceedings must be stayed until such is given.

At the plaintiff's suggestion I allow such security to be given by deposit of fifty pounds with the master, to remain in court to abide the event of the suit, as a security to defendant, on the usual contingencies contained in the common order for security for costs.

*Order accordingly.*

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\* See *Hodgson v. Graham*, 26 U. C. R. 127.—REP.

## BARBER V. ARMSTRONG.

*Replevin—Pleading.*

- Held*, 1. That section 18, Con. Stat. U. C. cap. 29, applies only to cases of a wrongful taking and detention within the latter part of section 1 of that act.
2. That the second count of the declaration, set out below, was in case and not in replevin, and could not therefore be joined with an ordinary count in replevin; but even if intended to be a count in replevin under the provisions in the latter part of section 1 it was improper; the facts being, that the action was against a pound-keeper for detaining certain horses distrained *damage feasant*, and therefore a case "in which by the law of England replevin might be made;" and in either case the count must be struck out.

[CHAMBERS, November 1, 1869.]

This was an action of replevin. The declaration contained two counts; the first an ordinary count in replevin, but omitting to state the locality in which the taking took place. The second count in its introductory part stated that the defendant was a pound-keeper, and as such received and took into his custody certain goods and chattels of the plaintiff, to wit, certain horses, &c., and that whilst the said goods and chattels were in the defendant's custody as such pound-keeper as aforesaid, and previous to the sale thereof, he, the plaintiff, considering and contending that the said goods and chattels had been and were illegally impounded in pursuance of and as required by the fourth sub-section of section 355 of 29 & 30 Vic. ch. 51, offered to give to the defendant and tendered to him good and sufficient and satisfactory security for all costs, damages and expenses that might be established against him, and did thereupon, as the owner of the said goods and chattels, demand from the said defendant the delivery up of the said goods and chattels to him, the plaintiff, as he lawfully might. Yet the defendant wrongfully refused to accept the said security or any security whatsoever, and wrongfully refused to deliver up to the said plaintiff the said goods and chattels, and unjustly detained the same from the said plaintiff against sureties and pledges, until, &c.

Upon being served with this declaration the defendant obtained a summons calling upon the plaintiff to shew cause



why the second count of the declaration should not be struck out, on the ground that the same is calculated to prejudice, embarrass and delay the fair trial of this action, and that the said count cannot, if in case, properly be joined with the first count of the said declaration, and if in replevin is superfluous; or why the defendant should not be at liberty to plead and demur to the declaration, on the ground that there is a misjoinder of counts, or why the first count should not be amended at the plaintiff's expense, by stating the particulars of the place whence the chattels, &c., therein mentioned, were taken.

*D. McMichael* shewed cause, contending that although the first count was in replevin, yet, supposing the second count to be in case, it might be joined, under the provisions of the first section of Con. Stat. U. C. ch. 29, entitled, "An Act relating to Replevin," otherwise it would not be possible for the plaintiff to avail himself of the provisions therein contained for "the recovery of the damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses." And if even nominal damages are given, and such would be the result without such a count as this, such recovery could be pleaded in bar of any subsequent action for substantial damages.

*Osler*, for the defendant, contended that the count was in case, in which event it was a misjoinder of actions, under the provisions of the Common Law Procedure Act, section, 73; or if it should be held to be in replevin, then it was unnecessary and should be struck out, and that the provisions of the act relating to replevin respecting damages did not refer to cases like the present, but to cases where the plaintiff brought replevin in place of trespass or trover. He also contended that it was necessary to state the place where the wrongful taking and detention took place, as this case did not fall within the provisions of section 18 of the Replevin Act.

GALT, J.—It is very difficult to say whether the second count is in replevin or in case for wrongfully refusing to accept the security mentioned in the declaration, although it concludes in the ordinary form of a count in replevin. I incline to think that it is in case, and, as such, is in contravention of the 73rd section of the Common Law Procedure Act, and must be struck out, but it is of very little consequence whether I am correct in this view, because if it is intended to be in replevin, it ought to be struck out as superfluous, for the following reasons. From the affidavits filed it appears that this is an action against a pound-keeper for detaining certain horses distrained damage feasant and placed in the pound, it is therefore a case “in which, by the law of England, replevin might be made,” and does not fall within the latter part of the first section of the Replevin Act, which was the portion relied upon by Dr. McMichael. The part referred to is as follows: “or in case any such goods, &c., have been otherwise wrongfully taken or detained, the owner or other person capable at the time this act takes effect of maintaining an action of trespass or trover for personal property may bring an action of replevin for the recovery thereof, and for the recovery of the damages sustained,” &c., as before mentioned. If, therefore, the second count is intended to be in replevin under the foregoing provisions, it is wrong, because, being a case in which by the laws of England replevin might be made, the said provisions do not apply. It also appears to me that the 18th section applies only to cases of a wrongful taking and detention within the latter portion of the first section, and not to cases of unlawful distresses for damage feasant, and therefore that local description is necessary. The summons is therefore made absolute to strike out the second count, and to amend the first with costs, and the defendant to have eight days time to plead to the amended declaration.

*Order accordingly.*

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OTT V. LIVERPOOL, LONDON, AND GLOBE INSURANCE  
COMPANY.

*Pleading several matters—Insurance—Mortgage of interest.*

In an action on an insurance policy, the defendants will not be allowed to plead together an equitable plea that the policy had been assigned by the plaintiff to secure a mortgage debt and that the amount of it had been paid to the mortgagee, and a legal plea that the plaintiff had effected a subsequent insurance without notice, contrary to a condition of the policy.

[CHAMBERS, November 16, 1869.]

This was an action upon a policy of insurance, stated in the declaration to have been entered into by the defendants with the plaintiff, for the purpose of insuring the plaintiff against loss or damage by fire to certain property of the defendants.

*W. Sidney Smith*, for the defendants, obtained a summons asking leave to plead a plea on equitable grounds, wherein the defendants alleged that before the policy was effected the plaintiff had agreed with one John Ott for a loan upon security of a mortgage of the property insured, together with a policy of insurance upon the mortgaged property as additional security to the mortgagee: that for the purpose of giving effect to this agreement, the policy sued upon was effected and was assigned to John Ott with the defendants' assent: that thereupon the defendants became liable to pay to John Ott the amount of any loss sustained under the policy not exceeding the mortgage debt: that at the time of the loss the mortgage debt exceeded the amount payable under the policy: that accordingly the defendants paid the full amount payable under the policy to the said John Ott, who accepted the same in full satisfaction and discharge of the policy.

This plea was asked to be coupled with a legal plea, to the effect that the policy was subject to a condition avoiding it if the insured, *i.e.*, the plaintiff, should effect another policy on the insured property, without notice in writing to the defendants, *so as the same might be endorsed upon the*

*policy*, and that the plaintiff did effect another insurance on the insured property, and did not give the notice as required by the condition.

*Lash* shewed cause.

GWYNNE, J.—As to the sufficiency or insufficiency of the equitable plea, I desire to express no opinion, but I must say that a careful examination of these pleas has led me to the conclusion that it would be highly objectionable to permit them to be pleaded together; the union of two such pleas involves in my judgment a repugnancy and incongruity of a character quite different from the inconsistency or repugnancy which is constantly permitted in the pleas which are ordinarily allowed as several defences to an action. The gist of this equitable plea is, that notwithstanding that the plaintiff is the person named in the policy as the insured, the true intent and meaning of the policy in its inception, and the real contract of the parties thereto, was to effect a policy in favor of the mortgagee for the insurance of the interest in the insured property; but the intention of the parties to the contract of insurance was that the defendants should be responsible to the mortgagee, which in equity they in fact were, and that in discharge of such responsibility they have paid him the amount payable under the policy; that in fact, although by the policy the contract appears to be entered into with the plaintiff, and would be so held to be at law, still that in equity the contract is in truth, and would be held to be, with the mortgagee, who in a court of equity would be held to be the “insured.”

Now without expressing any opinion upon the sufficiency or insufficiency of this plea, but for the sake of argument admitting it to be good, it would seem to follow as an equitable consequence that a second insurance effected by the mortgagor could not be a policy in the terms of the condition, and to be endorsed on the policy, which could have the effect of defeating a policy which the defendants contend is, in truth and in equity, entered into with the mortgagee as the “insured,” for the protection of *his* interest. If this policy be in equity



a policy entered into with the mortgagee as the "insured," it may be quite proper to permit the defendants to plead as many pleas as may afford them a sufficient defence, however inconsistent, in bar of his right of recovery upon the contract, which is said to have been entered into with him; but it seems to be at variance with the principles of that equity to advance which the plea is asked to be allowed, for the defendants upon the same record to regard the contract as a legal one in fact entered into with the plaintiff, and to plead in bar of that contract; and also to treat it as one not entered into with the plaintiff at all, but as an equitable one entered into with another person. If the pleas had both been so framed as to admit the legal contract sued upon, and the equitable plea was to the effect, that the plaintiff having assigned the policy, the defendant had paid the amount of the loss to the assignee of the chose in action, which was pleaded as a good payment in equity, which should bar the action at law—that would be a different state of things. These would be pleas both in bar to the *same contract*, the one as a legal bar, and the other as an equitable bar to the *same contract*, and the incongruity of pleading to the contract as a legal one, *bonâ fide* with one person for one purpose, and as an equitable one only; entered into with another person for a wholly different purpose, would not appear; but even then it might be, and here it is suggested that it would be inequitable in the defendants, after assenting to the assignment to the mortgagee, to object that the mortgagor had not given notice to the defendants of a second policy effected by him, so as to have it entered on the policy which had been assigned, and which by reason of the fact of assignment it might be impossible, as the defendants might know, for him to produce the policy so as to have the second policy which he had effected endorsed thereon.

As this equitable plea proposed to be pleaded is pleaded, however, I take it to convey that the policy sued upon must be regarded in equity as a contract whereby not the plaintiff but the mortgagee was the "insured," and that the defendants, treating it as such, have paid the "insured" the full

amount. The plea is offered as a complete bar to that contract, and it is sworn to be true. The other plea treats the contract as a valid legal one, and is offered as a bar to a different contract therefore from that to which the equitable plea is pleaded. This mode of pleading appears to me to involve us in an incongruity, which, in the exercise of the discretion vested in me to allow or disallow those pleas, I think should not be sanctioned with judicial approbation. I think that the principles of equity which the defendants themselves invoke, require that they should elect to treat the policy either as a legal one entered into with the plaintiff, or as an equitable one only entered into with John Ott, and not as both upon the same record.

*Summons discharged.*

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# LA BANQUE JACQUES CARTIER V. STRACHAN.

## *Lost note—Indemnity.*

A person suing on a lost note should, before he commences his action, tender an indemnity to the maker. If he neglect this it will be at the risk of costs to defendant.

[CHAMBERS, November 20, 1869.]

*Crombie*, for plaintiff, immediately after appearance, and before declaration, took out a summons calling upon the defendant to shew cause why, upon proper indemnity being given, he should not be prevented from setting up the loss of the note sued on in this action.

*J. G. Scott* shewed cause, and filed affidavits shewing that the note was payable on 5th July, 1869, at the Royal Canadian Bank: that the defendant on that day left funds at said bank to take up the note, and enquired for it at all the banks in the city, but that it was not presented for payment, having been, as was afterwards found out, lost before maturity; and that no tender of indemnity had been made by the plaintiff before action. He said he had no desire to raise the

question as to plaintiff's application being premature, but contended that an order should only be made upon the plaintiff undertaking to pay defendant's costs in case of the note being at once paid, as the suit was entirely occasioned by plaintiff's negligence. He urged that the indemnity ought to have been tendered before action brought, and that the rule in equity, previous to common law courts having jurisdiction to prevent loss being set up, should be followed, and cited *Davies v. Dodd*, 4 Price, 176; *Story's Equity Jurisprudence*, sec. 86, a; *Hopkins v. Adams*, 20 Vermont Rep. 407; *East India Co. v. Boddam*, 9 Vesey, 464.

*Crombie*, in reply—The statute gives the judge no authority to impose terms. Defendant should have tendered money and should have informed plaintiff that he would pay upon indemnity being given. Plaintiff has a right to commence the action, and must do so in order to give the court jurisdiction to settle the indemnity.

GWYNNE, J.—I think the defendant is entitled to be paid his costs of suit and of this application. Had it not been for the equitable jurisdiction now given by the Common Law Procedure Act to the courts of common law to prevent defendant setting up the loss of the note, the plaintiff would have been obliged to file a bill in equity. This court ought to exercise the power given them only upon the plaintiff submitting to equitable terms. I think the plaintiffs ought not to have commenced an action without tendering an indemnity. Had they done so, and such indemnity been refused, I might then have deferred my decision as to the costs until a reference to the master as to the sufficiency of the indemnity. I cannot assume that the defendant would have refused a sufficient indemnity. He seems to have been quite ready to pay. Upon the plaintiffs undertaking to pay defendant's costs, in case the note and interest be paid within twenty-four hours after approval of bond, the order must go. Defendant ought to pay interest as he has had the use of the money. See *Aranguren v. Scholfield*, 1 H. & N. 494; *Noble v. The Bank of England*, 2 Ex. N. S. 355, 33 L. J. Ex. 81.

The following order was afterwards drawn up: Upon the plaintiffs undertaking that in case the defendant do, within twenty-four hours after notice of the allowance of the security hereinafter mentioned, pay or tender to the said plaintiffs, or to their attorney in this action, the amount of the note sued on with interest thereon, that the plaintiffs will pay to the defendant his costs of this action and of this application to be taxed, I do order that upon an indemnity being given to the defendant to the satisfaction of the master of this court, if the parties differ, against the claim of any other person or persons in respect to the said note, that the defendant be restrained from setting up the loss of the said note as a defence in this action.

And I do further order that upon such payment being made, the plaintiff proceed no further with this action, and do pay to the defendant his said costs to be taxed by the master.

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EDWARDS ET AL. V. BENNETT.

*Ejectment—Re-taking possession.*

Under the circumstances set out below a new writ of *hab. fac. pos.* (the first having been executed and returned) was refused. *Wilson v. Chanton*, 6 L. T. N. S. 255, followed.

No such relief will be given to a plaintiff, when the parties against whom the application is made do not assert title through the defendant, but in some other way, and where no forcible taking possession or expulsion of the plaintiff, or interference with the plaintiff's officer in the execution of the writ, is shewn.

[PRACTICE COURT, M. T., 1869.—GWYNNE, J.]

*Osler* obtained a rule *nisi* last Term, upon the 19th November, calling upon Henry Bennett and James Erwin to shew cause why an order should not be made on them to leave or give up possession of the east-half of Lot No. 23, in the second concession of the Township of Woodhouse, and to restore the possession thereof to the plaintiffs, and why a writ of attachment should not issue against them, for having *illegally re-entered on the said lot against the plain-*



*tiffs' will*, directly after the sheriff had ejected them under the process of the court.

The affidavits in support of the motion stated that a judgment for want of appearance had been obtained against the above defendant, Henry Bennett, at the suit of the above plaintiffs, in September, 1868: that thereupon a writ of *hab. fac. pos.* was issued on the 21st July, 1869: that this writ was fully executed by the sheriff, on the 24th July, 1869, by the sheriff removing Mary Bennett and James Erwin, her son by a former marriage, and his brothers and sisters. (Mary Bennett having after the decease of her first husband, married the defendant, Henry Bennett, who at the time of the commencement of the action of ejectment was not living on the premises); and by his nailing up the door and window, and giving possession to one Davis, who resided on the adjoining lot.

The affidavit of Davis, which was also filed upon the motion, stated that the writ having been executed on Thursday, the 24th day of July, in the above manner, he observed smoke issuing from the chimney of the house on the following Tuesday, and that upon going to the house he found Mary Bennett and her son, James Erwin, in possession, and he suggested that Mary Bennett could only have got possession by striking off the board which had been nailed across the window. There was no allegation of any forcible taking possession, or any expulsion of Davis from his possession, nor was it stated that he in fact was in visible occupation. It appeared further, that the writ had been duly returned by the sheriff as fully executed by him on the said 24th July.

*J. A. Boyd* shewed cause, and filed affidavits of Mary Bennett and James Erwin, wherein it was sworn that Thomas Erwin, the father of James Erwin and first husband of Mary Bennett, about twelve years ago died seised in possession of the premises in question, of which he had retained undisputed possession for seventeen years or thereabouts before his death: that he died intestate, whereupon his estate and seisin in the premises descended to James Erwin and his

brothers and sisters, of whom there were several, as his heirs-at-law: that five or six months before the action of ejectment was brought against Henry Bennett, he had deserted his wife Mary Bennett, and left the premises: that when the action of ejectment was commenced, James Erwin was absent from home and knew nothing of it: that the bailiff who served the writ of ejectment upon Mary Bennett told her that the paper served was of no consequence to her, that it was not intended to disturb her or her children, and that she need give herself no uneasiness about it, and that accordingly she did not. The affidavits further stated that after the eviction by the sheriff, James Erwin, having taken legal advice, and in right of his title as heir of his father, and finding the premises unoccupied and the door of the house unlocked, re-took possession, and took his mother and the rest of the family into the house, claiming title through Thomas Erwin, who, as stated, died seised thereof.

GWYNNE, J.—From the facts shewn it appears that the parties against whom this application is made assert no claim whatever through the defendant in the writ of ejectment, but wholly independently of him, under right of the father of James Erwin, who, as it is said, died seised in possession of the premises. Neither the rule nor the affidavits filed in support thereof allege any *forcible* taking possession of the premises, or any expulsion of any person in possession on behalf of the plaintiffs, nor any actual interference with or disturbance of the officer of the court in the execution of the writ, which has been returned as fully executed.

I find no case, which, under the circumstances, would at all warrant me in making this rule absolute in the whole or in part.

In *Thompson v. Mirehouse*, 2 Dowl. 200, the affidavit upon which the motion, which was for a new writ of *hab. fac. pos.*, was made, stated that the sheriff's officer had been turned out of possession of the premises before he could deliver it to the lessor of the plaintiff, and that the deponent

believed that the parties committing the violence were combining with the defendant in order to prevent possession being delivered, but the court held it to be indispensably necessary that the defendant in the ejectment should be connected with the dispossession. In *Pitcher v. Roe*, 9 Dowl. 971, which appears to go further than any other case, it was the *defendant* in the ejectment against whom the motion was made, and who in the night of the same day that he was dispossessed, re-entered and took *forcible* possession of the premises. In *Lloyd v. Roe*, 2 Dowl. P. C. N. S. 407, the motion was for a fresh writ of *hab. fac. pos.*, upon a judgment obtained against the casual ejector, to eject the tenants in possession, and who, if the action had been defended, would have been the *defendants*, and who, a few days after they had been ejected under the writ of *hab. fac. pos.* obtained upon the judgment against the casual ejector, came again *and forcibly expelled* the plaintiff's agent, who was in visible occupation, and took possession again. In *McDermott v. McDermott*, 4 Prac. Rep. 252, a similar rule to the present was discharged, although it was the *defendant* in the ejectment who, about three weeks after he had been dispossessed, returned and re-took possession, the door being locked and nailed up as was done here. But the case of *Wilson v. Chanton et al.* 6 L. T. N. S. 255, (and reported as *Wilson v. Chartier* in 10 W. R. 546,) decided by the full court, appears to me to settle the point, and greater weight must be attributed to this decision, being that of the full court, than to any of the cases decided by a single judge in the Bail Court. In that case the sheriff had, on the 1st February, 1862, given possession of the premises to the plaintiff under a writ of *hab. fac. pos.*, issued upon a judgment obtained against the defendants. The plaintiff so put in possession retained possession until the 7th April following, when, the writ having been returned, two of the *defendants* in the ejectment *forcibly re-took* possession from the plaintiff of two cottages from which they had been evicted. Upon an affidavit of these facts, a motion similar to that which has been made in this case, was made upon

the 26th of the same month of April. Wilde, B., says: "After the writ of *hab. fac. pos.* was returned, the court as to that suit is *functus officio*." Pollock, C. B., says: "The application is entirely novel. I never recollect a similar one. Put the case of an action of detinue for a chattel, the plaintiff recovers and the article is delivered up to him, but afterwards the defendant again gets possession—the court could not summarily interfere to enforce its re-delivery." And Wilde, B., says: "There has been no interference with the sheriff's officer, and consequently no contempt of court; the writ for delivering possession had been executed, and its execution certified to the court and the whole thing completed; the power of the court was then at an end. If the plaintiff has a right to this rule, I do not see why he should not be able to obtain one at the end of twelve months, or even two years, after a defendant may have re-entered into possession." And the rule was refused.

The case before me is even stronger than that, when we see what is contained in the affidavits in reply. According to the plaintiff's own shewing, the writ was fully executed, and returned as executed on the 24th July. There is no allegation of any *forcible* taking of possession, or any expulsion of any person in occupation for the plaintiffs; and now, by the affidavits in reply, it appears that James Erwin, who was in no sense a party to the action of ejectment in which the judgment was obtained whereon the writ of *hab. fac. pos.* issued, and who has no connection in title whatever with the defendant in that action, but utterly repudiating all such connection and all title having ever been in that defendant, and in his own right as heir of his father, who as he says died seised of the premises, enters in assertion of that title, expelling no body, and takes with him his brothers and sisters, who according to his contention are co-heirs with him, and also his mother, who has no estate in the premises except as entitled to dower thereout.

The rule must be discharged with costs.

*Rule discharged with costs.*



## SMITH V. THOMPSON.

*Attorney—Lien for costs—Settlement between parties.*

Where a suit is commenced and carried on under instructions from a person who gave the attorney to understand that he was acting as agent for the plaintiff, but the attorney took no trouble to ascertain the truth of this, and proceeded without any communication with the plaintiff, the attorney will not be protected as to his costs where a settlement is made between the parties which has the effect of depriving him of his lien, but will be left to establish his cause of action against the plaintiff by suit.

[CHAMBERS, December 1, 1869.—GWYNNE, J.]

On the 29th day of October, 1869, the defendant obtained a summons calling upon the plaintiff to shew cause why an alias writ of *feri facias* against goods, issued upon the judgment in this cause, and all subsequent proceedings thereon should not be set aside, and satisfaction entered upon the roll, upon grounds disclosed in affidavits and papers filed.

On the 9th day of November following, the attorney for the plaintiff upon the record obtained a summons calling upon the plaintiff and the defendant to shew cause why either the plaintiff or the defendant should not pay to him his costs of the action to be taxed as between attorney and client, his costs upon the execution, and of the application.

After various enlargements, both summonses came on for argument on the 25th of November, 1869.

The action, which was one for the seduction of Mary Jane Smith, appeared to have been commenced by bailable process, issued against the defendant in the Spring of 1863, the affidavit to hold to bail being made by one Nelson Simmons, the uncle of Mary Jane Smith. The instructions for the commencement of the suit were, as the attorney swore, given to him by Simmons, who, as he says, gave him to understand at the time he so employed him, that he, Simmons, "was acting as agent for, and authorized by the plaintiff." Upon this retainer the action was proceeded with, and a verdict was rendered for the plaintiff of \$100, at the Spring Assizes, held at Picton in the month of April, 1863. After the rendering of the verdict, and in the month of May, 1863, (the plaintiff repudiating all connection with the

action,) the defendant and Simmons and Mary Jane Smith came together and made a settlement of the action, part of the consideration which led to that settlement being, as was alleged, the release by the defendant of a cause of action which he was then bringing against Simmons for malicious arrest in this action. Thereupon, and on the 15th day of May, 1863, the defendant received from Simmons and Mary Jane Smith a release, entitled in the cause and court, in the words following: "In consideration of an agreement entered into by the abovenamed Horatio N. C. Thompson, for the payment of a certain sum of money, the defendant, Horatio N. C. Thompson, is hereby released and discharged from the payment of the damages and costs in this cause, and the attorney of the above named plaintiff is hereby directed to stay all further proceedings in this cause against the above named defendant; this action having been instituted by the undersigned, Charles Nelson Simmons, on behalf of the plaintiff and his daughter. As witness my hand and seal this fifteenth day of May, 1863."

This instrument was signed,

THOMAS SMITH, by NELSON SIMMONS. [Seal.]

THOMAS SMITH, by MARY JANE SMITH. [Seal.]

GWYNNE, J.—According to the attorney's own shewing, the plaintiff had never up to this time, nor for long after, namely, not until the month of September last, in any manner recognized the action as having been instituted with his knowledge, consent, or authority.

Whether this document was or was not communicated to the attorney at the time it was executed is not expressly stated, but I think it reasonable to infer that he had some knowledge of it, for he himself shews that although the verdict was obtained in April, 1863, he did not enter judgment thereon until the 30th June, 1864, and no reason for such delay is suggested by him.

The defendant alleges that as the plaintiff wholly repudiated all connection with the action, and as the settlement was made with Simmons and Mary Jane Smith, who alone gave

instructions for the action, he always rested satisfied that the settlement was complete, and says that he never heard more of the action until certain goods of his father's and of his wife's were actually seized under the *al. fi. fa.*; he has, however, now procured a release from the plaintiff, dated 28th of October, 1869. The plaintiff, by an affidavit made the 23rd of November, swore that the action was commenced wholly without his authority and consent: that he has never recognized it or acquiesced in it: that he never gave the attorney any instructions whatever to enforce it by execution: that he never spoke to him on the subject at all, except once last September, when the attorney applied to the plaintiff for an assignment of the judgment to him: that he then refused the request, telling the attorney that he, Smith, had never authorized the action whatsoever: that he knew it had been settled between Simmons, his daughter, and defendant, and that he executed the release because he would not allow proceedings in this cause to be carried on in his name, by which he might have trouble and perhaps litigation.

By the attorney's own shewing he carried on the suit upon the authority of Simmons, without having ever communicated with the plaintiff in the matter at all until the month of September last, and as to what the attorney alleges took place on that occasion, the plaintiff most unequivocally contradicts him.

Under these circumstances, I can see no pretence for holding that the settlement made by the defendant was fraudulent and collusive for the purpose of depriving the attorney of his costs. An attorney who admits such looseness, as the attorney by his own affidavit shews to have taken place in the matter of his retainer, has only himself to blame, if it should turn out that the authority of the agent upon whose word alone he was content to rely, was insufficient for the purpose. The summons of the attorney, issued on the 9th of November, must therefore, in my judgment, be discharged with costs to be paid by the attorney. In view of the matters sworn to in the affidavits filed, I see no alternative open to

me, but to leave the attorney to establish his cause of action against the plaintiff by suit.

As to the other summons for entering satisfaction on the roll, I do not see what necessity there was for it, as the plaintiff appears to have been as willing to execute a satisfaction-piece, as the release which he has executed. As, however, the plaintiff claims no interest in the judgment, and swears that he never did claim any in it, or in the action in which it was recovered, the summons may be made absolute, but without costs.

*Orders accordingly.*

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OROK V. GARVIN.

*Certificate for full costs—Overflowing land—1s. Damages.*

Under the Statute of Ontario, 31 Vic. Ch., 24, sec. 1, a judge should certify for costs where he would have done so under the repealed section of the C. L. P. Act.

In an action for overflowing plaintiff's land, the defendant pleaded not guilty, and the jury found for plaintiff with 1s. damages.

*Held*, that under the circumstances of the case (there being important rights at stake, and it being such a case as would properly be removable from an inferior Court by *certiorari*), the plaintiff was entitled to a certificate for full costs under 31 Vic. Ch. 24 sec. 1. (Ont).

[CHAMBERS, December 10, 1869.—RICHARDS, C.J.]

This was an action for overflowing plaintiff's land by a dam maintained by defendant. The plea was, not guilty. The jury found for plaintiff, and one shilling damages. The plaintiff's counsel moved for the necessary certificates to entitle him to full costs, and to deprive defendant from setting off costs.

*McCarthy*, for plaintiffs, subsequently, on notice to the other side, renewed his application before the Chief Justice who tried the case. He contended that the action was really brought to try a right besides the right to recover damages, and that it was not a case of the kind



proper to be tried in the County or Division Courts : that the act of defendant was such as might, if permitted, ripen into a right, and the plaintiff was bound to bring an action to prevent this, and his action could only properly be brought in a proper court of record, so that, in the event of its being necessary to shew a recovery by the plaintiff in answer to a plea of enjoyment as of right for twenty years or more, he could prove the recovery by record made up with pleadings, postea, judgment, &c. If it were a case that was completely within the jurisdiction of the County Court, and the plaintiff could have known that at the outset, yet as the decision of the question raised in it might deprive the owner of the mill occupied by the defendant of a valuable right—viz., to raise the water to work the mill—the plaintiff might well think that if he had brought the action in the County Court, the defendant would have applied to remove it by *certiorari*. Independently of this, the law on the subject of riparian rights has recently been much discussed in England, and a question of great difficulty might arise in a suit of this kind.

*Boys*, for the defendant, contended that in this action it was simply decided that defendant had by his act injured the plaintiff to the extent of one shilling. The pleadings raised no question of right, and there was no more necessity for bringing this action in the superior courts than there would have been if defendant had cut a tree on the plaintiff's land, and the latter had brought an action to recover damages for the trespass, defendant setting up no right to commit the trespass, but merely denying the fact: *Emery v. Iredale*, 7 U. C. L. J. 181; *Thompson v. Crawford*, 9 U. C. L. J. 262; *Mitchell v. Barry*, 26 U. C. R. 416; *Marriott v. Stanly*, 9 Dowl. P. C. 59; *Shuttleworth v. Cocker*, *Ib.* 77; *Morison et al v. Salmon*, *Ib.* 387.

RICHARDS, C. J.—The words of the section of the Common Law Procedure Act were the same as those of the Imperial Statute 3 & 4 Vic. cap. 24, sec. 2. The first part of section 1 of the Statute of Ontario, 31 Vic. cap. 24,

is to the same effect as the Imperial Statute referred to. "If the plaintiff in any action of trespass, or trespass on the case, recovers by the verdict of a jury less damages than eight dollars, such plaintiff shall not be entitled to recover, in respect of such verdict, any costs whatever, whether the verdict be given on an issue tried, or judgment has passed by default, unless the judge or presiding officer before whom such verdict is obtained, immediately afterwards, or at any future time to which he may postpone the consideration of the matter, certifies on the back of the record, in the form hereinafter provided, to entitle the plaintiff to full costs," &c.

Under the Imperial Statute and the Common Law Procedure Act the proviso is to the effect, that the statute should not apply if the judge "certifies on the back of the record that the action was really brought to try a right besides the right to recover damages for the trespass or grievance complained of, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious." In the Statute of Ontario this proviso is entirely omitted, and it is left quite in the discretion of the judge to certify, to entitle the plaintiff to full costs or not. The decisions under the repealed Act may nevertheless be looked at, for I apprehend that under the existing statute the judge would certify when he would have done so under the repealed section of the Common Law Procedure Act.

In *Shuttleworth v. Cocker*, 9 Dowl. P. C. 82, Tindal, C.J., in referring to the English Act said, "I take the object of this Act to be to prevent plaintiffs from bringing actions of a vexatious and litigious nature, where only a small damage has been sustained, and where no right whatever is in issue between the parties; and if actions are brought in such instances certificates cannot be granted, and the plaintiffs lose their costs." That was an action wherein the plaintiff, the owner of a house, complained of the defendant, who was the owner of a mill and workshop, that he used the engine, &c, on his premises, so that noise, smoke, and injurious dust, came from them and injured the plaintiff's house, and rendered it uninhabitable. The defend-

ant in answer pleaded not guilty, that is, he denied that that which was stated on the face of the declaration had taken place. The learned Chief Justice then proceeds: "Looking at these circumstances the plaintiff declares that his house is rendered uninhabitable by reason of the defendant's acts, and on the other side the defendant, insisting on going on with the works which he has commenced, and which the plaintiff says form the ground and gravamen of his charge, who can say that a question of right does not arise between the parties. The plaintiff complains that his right to his house free of the nuisance which is alleged on the record is invaded, and the defendant says on the other side that this, which is alleged to be a nuisance, is in fact none at all. Therefore looking at the facts of the case it does not appear to be one in which the plaintiff is going on vexatiously, or for small damages only, but that it is a case in which the right came in question. On the evidence which was adduced the case took the same course. The defendant strove, not so much to prove that the plaintiff had sustained very small damages only, and the cross-examination was very much directed to that point, as that the defendant had adopted modes of carrying on his manufactory with as little injury as possible, still maintaining his right, however, to carry on the same business. Therefore, in my opinion, it is an action really brought to try a right besides the mere right to recover damages; and one cannot but ask why, if it were not so, the defendant did not admit the right of action and proceed only on that part of the case which would be directed to the mitigation of damages?"

Bosanquet, J., in his judgment, said: "In order to support the defendant's view, the action must not have been brought to try the right, and the defendant must have admitted he had no right to do the act; and if the real question was as to the damages only, there is no doubt that it would be a case in which the judge should not have certified. \* \* \*

The defendant insisted that he was not in the wrong, that he was right, and in consequence, that the plaintiff had no right to maintain the action."

In *Morrison et al. v. Salmon*, Ib. 392, the case above cited is approved of, and in reference to it Bosanquet, J., said: "Nuisance may either be brought to recover damages for an injury to an acknowledged right, or to try a question whether the defendant has or has not a right to do that which he has done, which is very commonly the subject of question in an action of this sort." Maule, J., said: "Supposing the plaintiffs had proceeded in the Court of Chancery for an injunction \* \* \* and the court had said that there was some uncertainty as to their right, and that they must establish it in a court of law. The plaintiffs must in that case bring their action in order to substantiate their right; and if the argument which has here been brought before the court were to prevail, they would be deprived of their costs."

It appeared at the trial of this case that the persons under whom defendant held had taken a lease of the land overflowed from the plaintiff, which had expired, and plaintiff was willing to grant a lease to defendant for the term for which he had agreed to take the mill, at a small rent, and that defendant had declined to take this lease.

Under the facts of this case, and under the decisions referred to, I am of opinion, if this action had been one which was exclusively within the jurisdiction of the Superior Courts, I should have felt bound to certify under the first section of the act of Ontario, to entitle the plaintiff to full costs.

The defendant did not content himself with admitting he had overflowed defendant's land, and contending that only small damages were committed, but, as stated by Chief Justice Tindal, in the case referred to, had stoutly contended that his dam did not overflow plaintiff's land at all. He did not admit that he had not the right to keep his dam up to its then height, and pen back the water as it was then penned-back, but contended that the right he exercised did not interfere with plaintiff's land. Surely this right was tried, and comes within the principle of the case referred to.

It is contended that this suit is of the proper competence of



the Division or County Court. The action in form is not out of the jurisdiction of either of these courts, and the amount given by the jury as damages does not put the case properly in a superior court. The plaintiff contends, and the jury have found, that the defendant has prevented the water of the stream passing through his land from flowing in its natural course, and has penned the same back on the land of the plaintiff. He contends, if this had been allowed to continue for twenty years, it would create a right, and therefore he was acting properly in bringing this action to prevent an easement prejudicial to him being acquired as to his property. And he was equally warranted in bringing the action in this court, on account of the difficult questions of law likely to arise in the course of the action, and the propriety of having the action in a superior court of record to prove the recovery when necessary.

In this particular case, the defendant contended, at the trial, and called witnesses to prove, that the plaintiff's land was not overflowed by the dam used by him. The jury nevertheless, found against him on the facts brought out on the plaintiff's case. The defendant had refused to take a lease at a small rent, and both parties went down to try a case involving apparently important interests to them, and each called a large number of witnesses, including a surveyor on either side. Suits such as these are not usually tried in the inferior courts, and when commenced there would be bound to be removed into the superior courts almost as a matter of course, on the application of the defendant. If the plaintiff, however, went on in the inferior court, and the title to land was raised on the pleadings, or on the trial, the suit would at once stop. Whilst the law is in this state, I do not think it unreasonable that actions like the present, under the facts shewn, should be commenced in the superior courts.

If the law is changed so that when the question involving jurisdiction is raised in the inferior court the case can be readily transferred to the superior court, then the court and judges will feel less embarrassment in disposing of questions

of costs when verdicts for an amount within the jurisdiction of the inferior court are rendered in cases tried in the superior court, when the excuse suggested for taking the cause into the superior court is that they feared the defendant might take a course not necessary to try the merits of the cause, to oust the inferior court of its jurisdiction.

*Certificate granted.*

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REGINA V. REIFFENSTEIN.

*Extent—Commission to find debt—Affidavit of danger—Felony and civil remedy.*

- Held*, 1. That a debt whereon to found a writ of extent may be found on inquisition without *vivâ voce* testimony.
2. That an affidavit of danger is sufficient if it satisfy the judge to whom the application for a fiat for a writ of extent is made, that there is danger that the debt will be lost if immediate remedy is not granted.
3. That it is not an irregularity, that an inquisition finds that the defendant was a debtor to the Crown on the 20th July, the inquisition being filed and a writ of extent issuing on the 21st July.
4. That the rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded, does not apply where the Crown, and not a private person, is the plaintiff.

[CHAMBERS, December 30, 1869.—GALT, J.]

This was an application to set aside a writ of extent.

On the 17th July last, a commission to find debts against the defendant, a clerk in the office of the Receiver General, was issued from the Court of Queen's Bench, on a *fiat* of the Chief Justice of the Common Pleas, founded on an affidavit of John Langton, Auditor of Public Accounts, who stated the fact of the indebtedness; but no *vivâ voce* testimony was taken by the commissioners, who acted on this affidavit alone.

The commission, with the finding of the debt by the commissioners and jury thereon endorsed, was returned and filed on the 21st of July, when, on reading the commission, inquisition, and affidavit of danger, a writ of extent was by *fiat* of a judge taken out, directed to the sheriff of the county of Carleton.

The affidavit of danger, filed on the application of the *fiat*, was made by Mr. Langton, as follows:—

“That I was the auditor of the public accounts of the late Province of Canada for many years immediately before the establishment of the Dominion: that I have been the auditor of the public accounts of the said Dominion ever since its establishment, and that I have a personal knowledge of the facts hereinafter mentioned and contained: that one George C. Reiffenstein was for many years, and up to the establishment of the said Dominion, a clerk in the department of the Receiver General of the said late Province: that he has been ever since the establishment of the said Dominion up to the 26th day of June now last past, a clerk in the department of the Receiver General of the said Dominion, and that a portion of his duties, as such clerk, was the superintendence of the distribution of the municipalities’ fund of Upper Canada: that it has been up to this time ascertained, on investigation of the accounts of the said George C. Reiffenstein, that he has, during the period he has been so acting as such clerk as aforesaid, from time to time, fraudulently misappropriated divers large sums of money, which belonged to the Government of the said late Province and the said Dominion respectively, the whole or considerable portions of which said sums of money he fraudulently converted to his own use; such several sums of money amounting in the whole to the sum of twenty-two thousand dollars or thereabouts, and that he, the said George C. Reiffenstein, is now a defaulter and indebted to the Government in that amount: that the said George C. Reiffenstein is at present in custody in the common jail of the said county of Carleton, in respect of the fraudulent misappropriation aforesaid, and criminal proceedings are now being taken against him therefor: and lastly, that I am informed, and do verily believe, that the said George C. Reiffenstein is possessed of moneys and other property within the said county of Carleton; and that it is desirable that an immediate writ of extent should issue on behalf of the Crown, to attach such moneys and

other property; and I verily believe that unless such writ of extent do issue forthwith, there is danger of the said moneys and other property being made away with, and entirely lost to the Government of the said Dominion, and of the claim of the Crown for the moneys so misappropriated as aforesaid being thus defeated."

The return of the commission to find debts, as well as the writ of extent, alleged that the defendant became a debtor of record to the Crown on the 20th of July, 1869.

On the 25th of November, the writ of extent was returned and filed with the sheriff's return thereto.

Mrs. Reiffenstein, wife of the defendant, subsequently appeared and claimed part of the property, real and personal, seized under the extent.

*O'Brien*, on the 29th December, on filing verified copies of the papers above referred to, obtained a summons calling on the Attorney General for the Dominion to shew cause why the said writ of extent, and all the proceedings had thereunder, should not be set aside, on the following grounds:—

1. That the inquisition to find debts was taken on the affidavit of John Langton only, the said John Langton not being present upon such inquisition, nor any evidence of any witness being taken *vivâ voce*.

2. That the writ issued without any affidavit of insolvency or other affidavit sufficient to shew grounds according to the practice.

3. That the writ of extent mis-stated the day that the defendant became a debtor of record, the inquisition to find debts not having been returned and filed until the 21st of July, whereas the writ states him to have been a debtor of record on the 20th of July.

4. That the affidavit on which the said writ issued charged that a felony had been committed, so that no writ could issue to find debts, or debts be found or enforced which were the subject of the felony, until the prosecution of the defendant to conviction for the felony; or why all proceedings herein should not be stayed until the fifth day of next Term, &c.



*R. A. Harrison*, Q. C., shewed cause and took the following preliminary objections:—

That the original writ was not before the court, and on this ground alone the application must be discharged. It would not suffice to put in a copy, as the defendant had done in this instance: *Manning's Exch. Prac.* 114; *King v. Mallett*, 1 Price, 395.

The application is too late. A motion to set aside a proceeding for irregularity must be made promptly. The extent was issued on the 22nd of July, and this summons was taken out on the 29th of December. In the meantime Mrs. Reiffenstein had appeared to the writ, and claimed the property, and had asked time to plead, and the defendant had been represented on the trial of the claims of Mrs. Reiffenstein, and he must be barred by such delay and waiver: *Manning's Exch. Prac.* 114.

The motion should have been to set aside the *fiat* of the judge on which the extent issued. So long as the *fiat* stood, the writ must stand: *Rex v. Rippon*, 3 Price, 38.

As to the grounds taken in the summons he contended:—

1. That even if evidence by affidavit be insufficient, that is no ground to set aside the *extent*. By the practice an affidavit is sufficient to find the debt: *West on Extents*, 22; and *Regina v. Ryle*, 9 M. & W. 227, is a direct authority in its favour.

2. The affidavit of danger was sufficient in the opinion of the judge who granted the *fiat*, and that is all that is necessary, and this *fiat* is not moved against. But the affidavit is sufficient according to the practice: *Manning's Prac.* 11, 262.

3. If the date is not properly stated, the defendant may plead to that effect. But it is sufficient to say that there was a debt at the time of the investigation.

4. The reason for the rule on which this objection is founded does not apply where the Crown is concerned, and in any case it is no reason for setting aside the proceedings.

*J. H. Cameron*, Q. C., (*O'Brien* with him) supported the summons.

As to the preliminary objections : the case in *Price* proves nothing, as apparently there was not even a copy of the writ before the court. The objections go to the ground work of the writ, and the motion is therefore not too late. It is not necessary to move against the *fiat*, as that stands, and if this writ is set aside, a new extent can issue on the same *fiat*.

As to the grounds in the summons:—

1. The alleged practice is objectionable, and should not be followed, and the cases authorizing it should be reviewed by the full court, and both in *Manning* and *West* the practice is remarked upon as one which “no lapse of time can legalize.”

2. Not only must insolvency be shewn, but also the facts which establish it must be set out: *West* on Extents, 51; *Manning's* Exch. Prac. 12.

3. The mistake of the day appears on the face of the writ, and there is a manifest false statement on the record; and this may be of great importance to third parties whose rights may be interfered with by such an error. The inquiry only shews that the defendant had lands when he was *not* a debtor to the Crown.

4. The prosecution for the felony should be concluded before the civil action is gone on with, and the same rule should apply in Crown as in other cases.

It was also urged that if there was any doubt on the points taken, it would be proper to let the matter stand until term, especially as all the defendant's property was under seizure.

GALT, J.—I shall speak of each point as it appears on the summons. The grounds are:—

1st. That the inquiry to find debts was taken on affidavit without any witness being examined *vivâ voce*.

A similar objection was taken in the case of *Regina v. Ryle*, 9 M. & W. 227, and expressly overruled by the Court of Exchequer,

2nd. That the writ issued without any affidavit of insolvency, or other affidavit sufficient to shew grounds according to the practice. Mr. *West*, in his Treatise on the Law of Extents, page 47, states: "The need for the immediate extent is shewn to the court by the affidavit that the debtor is insolvent, which is called an affidavit of danger; and the court (or single Baron) shews the exercise of its (or his) discretion as to the expediency of issuing the immediate extent by granting the *fiat*." The *fiat* in this case was granted by the learned Chief Justice of the Common Pleas, on an affidavit which satisfied him that this was a case in which an immediate extent should issue, and I should certainly never think of interfering with the exercise of his discretion, but would, if I entertained any doubt, postpone the case for the consideration of the court. I must say, however, that had the application been made to me I would without hesitation have given the *fiat*. As far as I can understand the law as laid down in Mr. *West's* Treatise, all that is necessary is to satisfy the court or judge that there is danger that the debt will be lost if immediate remedy be not granted; and whether the danger arises from insolvency, (which is the usual ground) or from any other cause which satisfies the court that such danger really exists, is immaterial. I do not specify the particular reasons assigned in the affidavit in this case, but they would have been quite sufficient to have induced me to grant the *fiat*.

3rd. That the writ of extent mis-states the day that the defendant became a debtor of record, the inquisition to find debts not having been returned and filed till the 21st of July, whereas the writ states him to have been a debtor of record on the 20th of July. The inquisition was dated on the 17th of July, and appears to have been taken on the 20th July. There is a memorandum endorsed on the copy before me to the effect that it was filed on the 21st. There is no formal statement of any kind as to when it was received and filed. I cannot see in what manner the defendant can be prejudiced by this mistake (if it is a mistake, for no authority was cited by the learned counsel), and if, in truth,

any of the property extended was acquired by him between the finding of the inquisition on the 20th, and the filing of it on the 21st, he might shew it, I presume, so as, *quoad* that property, to claim that it was not found by the inquisition or liable to the *extent*. In the absence of any such allegation I see no reason for setting aside the extent.

4th. That the affidavits on which the said writ issued charged that a felony was committed, so that no writ could issue to find debts, or debts be found or enforced, which were the subject of the felony, until the prosecution of the defendant to conviction for the felony. This objection appears to me to be founded on a misapprehension of the law as applies to private persons; the reason of the rule which prevails between private persons, that until the ends of justice have been satisfied by the prosecution of a person charged with felony no action can be maintained for a private wrong, can have no application to a case in which Her Majesty is a party.

I therefore think that this summons should be discharged.

*Summons discharged.*

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### THE QUEEN V. MURDOCH McLEOD.

*Change of venue in criminal cases—32-33 Vic., cap. 29 sec. 11.*

*Held*, that 32-33 Vic., cap. 29, sec. 11, does not authorize any order for the change of the place of trial of a prisoner in any case where such change would not have been granted under the former practice, the statute only affecting *procedure*.

[CHAMBERS, January 5, 1870.]

The prisoner in this case was under recognizance to appear at the next Assizes at Kingston, in the county of Frontenac, to answer a charge of manslaughter.

*W. Mortimer Clark*, on behalf of the prisoner, applied under the provisions of 32-33 Vic., cap. 29, sec. 11, entitled "An Act respecting procedure in criminal cases, and others matters relating to criminal law," for an order to



change the venue from the county of Frontenac to the county of York, upon an affidavit in which the prisoner stated that he was informed and believed that all the witnesses intended to be examined on behalf of Her Majesty at his trial resided at the City of Toronto, that any witnesses to be examined on his own behalf at his trial resided at or near the said City of Toronto, and that he was unable to pay the expense of the attendance of witnesses on his behalf, and the counsel he desired to retain at his trial, if it should take place at the City of Kingston.

*Leith*, shewed cause for the Attorney General.

It would be a bad precedent to allow a change of venue on the grounds disclosed. The Act gives no jurisdiction to a judge to change the venue on these facts, and the mere poverty of the prisoner is no sufficient reason.

The statute is not intended to give any new ground for changing the venue, but merely to simplify procedure, and to prevent the necessity of proceeding under the old and inconvenient practice of removing the case into the Queen's Bench by *certiorari*, and then moving to change the venue. The affidavit at all events is insufficient, as it does not shew the particulars as to witnesses, &c., required by the practice on applications to change the venue.

*Clark, contra.* It is a mere matter of discretion with the judge; and, owing to the poverty of the prisoner "it is expedient to the ends of justice" that the place of trial should be changed.

GALT, J.—Section 11 is as follows: "Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with felony or misdemeanor should be held in some district, county, or place, other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court at which such person is or is liable to be indicted, may at any term or sitting thereof, and any judge who might hold or sit in such court may, at any other time, order, either before or after the pre-

sensation of a bill of indictment, that the trial shall be proceeded with in some other district, county, or place within the same Province, to be named by the court or judge in such order ; but such order shall be made upon such conditions as to the payment of any additional expense thereof caused to the accused, as the court or judge may think proper to prescribe." In the affidavit there is no allegation that the accused is apprehensive that a fair trial cannot be had in the county of Frontenac, as was the case in *The King v. Holden*, 5 B. & Ad. 347, and *The Queen v. Palmer*, 5 E. & B. 1024. In the former case the application was refused, but it was granted in the latter on the consent of the Attorney General.

It appears to me that the contention of Mr. Leith in this case is the correct view of the intention of the Legislature, namely, to substitute proceedings like the present for the old practice of removing the case by *certiorari* into the Queen's Bench, and then moving to change the venue, and that an order such as prayed for should be made only in cases where under the former practice a change of venue would have been granted ; in other words, "when it is expedient for the ends of justice that the trial should be held in some other place than that in which the offence is supposed to have been committed." It is quite clear that no such change would have been made in this case, and therefore the present summons should be discharged. There is no saying to what inconvenience the granting of applications like the present might not lead.

*Summons discharged.*

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## IN THE MATTER OF MARY THERESE KINNE.

*Custody of infant—Right of father—29–30 Vic. cap. 45.*

A girl aged thirteen years and ten months, who had lived with her aunt from her infancy, was allowed, on an application by her father for her custody, on allegations that she was illtreated by her aunt, to elect whether she would remain with her aunt, or go to her father.

*Semble*, that if the child had recently left or been taken away from her father she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen.

[CHAMBERS, January 12, 1870.—HAGARTY, C. J., C. P.]

On the 6th December, 1869, *O'Brien*, on behalf of Thomas Kinne, the father of Mary Therese Kinne, obtained a writ of *habeas corpus* under the provisions of 29–30 Vic. cap. 45, on the fiat of Mr. Justice Galt, commanding Stephen Keever and Lucy Keever, and such other person as might have the custody or control of the said Mary Therese Kinne, to have her body before the presiding judge in Chambers, &c.

The order for this writ was founded on the following affidavit of the father of the girl, who described himself of the Town of Hopewell, in the County of Albert, in the Province of New Brunswick, farmer :

“Mary Therese Kinne, now to the best of my belief residing in the Township of Harwich, in the County of Kent, of Canada, is my daughter by my late wife, Mary Kinne, now deceased. She was born in Harvey, in the County of Albert aforesaid, on the fifth day of March, one thousand eight hundred and fifty six, and for the greater part of her life she has resided with her aunt Lucy Keever, wife of Stephen Keever, of Harwich aforesaid, yeoman. Her mother died about three years ago. In August last I received letters from the said County of Kent, from persons acquainted with said Keever, and from the information they contained, I was induced to travel from my home in New Brunswick to Chatham in Kent aforesaid, to look after the child, and from the information I have received from inquiries made since my arrival in Chatham, I have no doubt that she is and has been most brutally and inhu-

manly treated by her aunt aforesaid, and that it is absolutely necessary that I should take her in my charge and provide for her myself at my home in New Brunswick. Upon my arrival in Chatham, I had interviews with the said Keevers, and informed them of my desire that the child should return to New Brunswick with me. They seemed at first disinclined to allow this, but afterwards appeared quite willing, and Mrs. Kever said she had only wanted a little delay to prepare clothing for the girl's departure; but this appears to have been only done to lull suspicion, as both the Keevers now absolutely refuse to give up the child, and state that she has left them, and they do not know where she is, but Mrs. Kever said she could find her."

On 17th December, Stephen Kever and Lucy Kever made and filed a return to the writ, to the effect that they could not produce the said child as commanded, as she was not, and had not for some weeks past, been in their custody or control. This return was verified by their affidavits.

An enlargement was thereupon obtained to enable Thomas Kinne to object to the sufficiency of the return to the writ, and to contradict the truth of the facts set forth in the return, under sec. 3 of 29-30 Vic. cap. 45.

Pending this examination of the truth of the return, and an application being about to be made under sec. 2 of the same Act for the apprehension of the Keevers for disobedience of the writ, Mrs. Kever appeared in Chambers with the child, alleging that since the filing of the return she had ascertained where the child was, and that she then produced her in obedience to the writ. The next day, Thomas Kinne, Mrs. Kever, and the child, being in court,

*O'Brien* moved for an order for the delivery of the child to her father. He filed affidavits charging Mrs. Kever with neglecting the child's education, with severe and improper punishment of the child, with gross acts of cruelty to her, which were alleged specifically: that Mrs. Kever was of such an ungovernable temper, that she was not fit to be entrusted with the care of a child: that the child was



of weak mind from the effects of the ill-treatment; and, from her youth, ill-treatment, and fear of her aunt, was not fit to judge for herself as to with whom she would prefer to remain.

He contended that the father was legally entitled to the custody of the child, at all events as against a stranger, which, in the eye of the law, the aunt must be taken to be, and that an order should be made for the delivery of the child to the father: that the affidavits established improper treatment of the child generally, and several specific acts of personal violence towards the child of an outrageous kind: that the child should not be allowed to choose to whom she would prefer to go, being of such tender age, and not being of sufficient intelligence to exercise a reasonable judgment; and that even if as intelligent as the aunt contended, such precocity might itself be required to be guarded against: that being under fourteen years of age, she would in law be deemed incapable of exercising an election: that she was in fear and dread of her aunt, and would act under the influence of that fear, and that the aunt had taught the child to dislike her father: that it would be improper in every way, and contrary to the law of nature that a father should be deprived of his child, whom he had not abandoned and was willing to support, and whom he had evinced his determination to protect by coming the great distance he had, upon hearing the reports of her ill-treatment by her aunt, and that it would be a great cruelty to the father to let him return home believing that his child was ill-treated, and induced to dislike him.

*J. B. Read*, in reply, filed affidavits stating that the child was, when about seventeen months old, taken by her aunt, then unmarried, to bring up, with the consent of her father and mother: that the aunt had continued to have the care of the child until her mother's death: that after that event, with the consent of the father, the child continued to remain with the aunt: that with the same consent and permission the child was brought to the Province of Ontario from New Brunswick, where all the parties formerly resided, and that

the child had ever since remained with the aunt. The charges of cruelty, both general and specific, were denied by Keever and his wife, and their statements were corroborated by others. It was also stated that the child was sent to school and well taken care of: that there were feelings of hostility between Mrs. Keever and the relatives of her husband, who were afraid that Keever, who was well off, would leave his property to the child: that the child's father had no house of his own, but boarded out, and that the future welfare of the child required that she should remain with her aunt.

He urged that, in addition to the evidence in the affidavits, the very appearance of the child refuted the charges of neglect of her bodily wants or mental culture: that the child was resolved not to go with her father, but to remain with her aunt: that if the judge was satisfied that the case was met on the affidavits, the father could not complain, as he had suffered the child to grow up from infancy with the aunt, who had all the care and trouble of training and providing for her, and was attached to her: that in law the father was not legally entitled to the custody of the child under the circumstances: that all the court or a judge could do would be to order that the child should be removed from any restraint on the part of her aunt, and be given to understand that she was free to go with whom she pleased, without fear of the consequences: that if she preferred to go with her father she should be allowed to go with him—if with the aunt, then to go with her.

The following cases were cited: *Rex v. Smith*, 2 Strange, 982; *Rex v. Greenhill*, 4 A. & E. 624; *Rex v. Isley*, 5 A. & E. 441; *Reg. v. Smith*, 22 L. J. Q. B. 116; *Ex parte Barford*, 3 L. T. N. S. 467; *Reg. v. Howes*, 3 El. & El 332; 7 Jur. N. S. 22.

The case was argued before the Chief Justice of the Common Pleas and Mr. Justice Gwynne, who examined the child for some time apart from her father and aunt, to ascertain the degree of intelligence she had attained, and explained to her fully that she was free from all restraint of her aunt, and was then under their protection.

Judgment was thereupon given by

HAGARTY, C. J., C. P.—We have carefully examined this child and explained to her her position. We have also read with much care the affidavits filed on both sides. We think that the father, upon hearing the reports of the alleged cruelty, acted very properly in making this application, and did what we should expect a parent to do in such a case; but we do not think he can succeed in his present contention.

The affidavits are certainly conflicting, but there is a very satisfactory denial, well supported, of the alleged cruelty of the aunt; and the circumstances connected therewith are somewhat unusual, because it is seldom that parties are so fortunate as to be able to procure such strong corroboratory evidence in denial of such specific charges, as is now produced. We consider the charge of want of intelligence of the child not in any way supported; her manners and answers establish to our satisfaction that the child is peculiarly intelligent and fully understands her position.

The only order we can make is, that the child is free to go with whom she chooses. It is perhaps only natural that having lived nearly all her life with her aunt and not knowing her father, she will, if the former has treated her well, prefer to remain with her aunt than go with her father; and it is important to be remembered that the aunt and her husband have, since the child was an infant, taken care of her and provided for her, at their own expense, and the father has not until now made any effort to get the child to return to him, and has paid no part of the expense of maintaining her. If she has not been well treated, she has now an opportunity of leaving her aunt and going to her father and other relatives in New Brunswick. We should regard the case very differently if this girl had recently left or been taken away from her father. In such a case the law apparently orders her to return to her father, without reference to her own choice, at all events until she attain the age of sixteen.

The case of *Reg. v. Howes*, 3 El. & El. 332, cited by Mr.

O'Brien, is very strong as to the general rule. Our statute, Consol. Can. ch. 91, sec. 26, supports that general view.

We decide this case in its particular circumstances, without infringing, as we believe, on the principles laid down in *Reg. v. Howes*.

Upon the child electing with whom she will go, the disappointed party must be careful not to resort to any improper means to deprive the other of the child.

The learned Chief Justice then told the child that she might go away either with her father or her aunt, and she at once, with apparent willingness, went to the latter.

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### THE QUEEN V. ROBINSON.

*Extradition—Evidence—Depositions—31 Vic. cap. 94.*

Under section 2 of the above Act, the depositions that may be received as evidence of the criminality of the prisoner must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing it, and not depositions taken subsequently to the issue of the original warrant and without any apparent connection therewith.

[CHAMBERS, January 26, 1870.—MORRISON, J.]

A writ of *habeas corpus* was issued directing the keeper of the jail of the County of York, to bring up the body of John O. Robinson. The body of the prisoner was accordingly produced before Morrison, J., with the writ and return.

The cause of detention was shewn to be a warrant of Alexander McNabb, Esq., the Police Magistrate of the City of Toronto, dated the 22nd day of January, 1870, setting out that the prisoner was charged, on the oath of one Warren, a Deputy United States Marshal, and others, that he did on or about the 10th April, feloniously, &c., burn; and consume a certain dwelling house in the town of Somerville, &c.. in Massachusetts, one of the United States; to be detained in custody until surrendered according to the stipulations of the treaty between Her Majesty and the



United States of America, or until discharged according to law.

A writ of *certiorari* was also issued at the same time, under which the Police Magistrate returned all the proceedings had before him. It appeared from them that an information had been laid before Mr McNabb, on the 22nd December last, by one John C. Warren, a Boston Deputy United States Marshal, stating that he had been informed, and believed, that the prisoner on or about the 10th April last, did feloniously &c., burn and consume a certain dwelling house (not stating the owner), at the town of Somerville, in the County of Middlesex, in the state of Massachusetts—and not even stating that the prisoner fled to Canada.

On this the Police Magistrate issued his warrant on the same day for the prisoner's apprehension, upon which warrant he was arrested. He was remanded until December 24th, when John C. Warren being examined deposed that he knew the prisoner: that he left Somerville last June or July: that he was charged with setting fire to a house owned by one Barrett.

A paper was produced to the witness which contained statements and depositions made by three persons, named Patton, Horton, and Fingay, stating facts and conversations with the prisoner relative to the burning of the house in question—underneath which statements and depositions was written—"Middlesex, December 13, 1869. There personally appeared the above named (naming the parties), and made solemn oath to the truth of the above statements by them subscribed before me, Isaac S. Muse, Justice of the Peace."

The witness Warren stated he was present when these statements were made, and that he saw the Justice of the Peace (Muse) sign them; he also stated that he was not aware that any warrant issued on these statements or depositions—he said that a warrant had issued for the prisoner's arrest before the depositions in question—but he was not aware that any depositions were taken under such

warrant; he also stated that he knew Patton and Horton, that he had had a bench warrant in July last against the prisoner upon a criminal charge, arising out of the bankruptcy of the prisoner, upon which it appeared that he had been arrested, and that Patton and Horton had become bail for him in the charge.

The prisoner was remanded to the 31st December, when Warren was again examined, and a certificate being shewn to him, he stated it was a certificate of one John W. Pettingill, Trial Justice for the County of Middlesex; he proved this certificate, and that he, Pettingill, was a Trial Justice, but no evidence was given as to what was meant by a Trial Justice. The certificate was dated 28th December, 1869, and it certified "that the within complaint and warrant are true copies of the original complaint and warrant before me; also that the within named John O. Robinson hath not appeared or pleaded to the said complaint since the date of the same." Attached to the certificate was a complaint—commencing as follows: "To John W. Pettingill, Esq., a Trial Justice, &c., Calvin Horton, on behalf of the Commonwealth of Massachusetts, on oath complains, that John O. Robinson, &c., on the 18th of May, 1869, &c., the dwelling house of one Barrett, in Somerville, &c., feloniously, &c., set fire to, &c.,"—and he prayed that he might be apprehended and held to answer to said complaint, &c. Underneath, on the same sheet, was a warrant to take the prisoner and bring him before the said Trial Justice, or any other Trial Justice, in any Police Court, &c., to answer to the foregoing complaint of Calvin Horton, &c. The witness stated that he saw the original warrant and information in September last; that he compared the copy made then with the original information and warrant, and he said he knew the copies produced to be true copies; he stated, however, that he never compared them with the original, nor did he see them compared.

The prisoner called witnesses, from whose testimony it appeared that he left the United States on account of the charge arising out of his bankruptcy, and that Horton and

Patton were his bail, and that Horton boasted he would have the prisoner brought back: that the house in question was only partially injured by fire on the 19th April last. The person who contracted to build the house was also examined. The house was not finished but in course of construction at time of fire, and no person resided in it at the time; other evidence<sup>was</sup> given to shew that the owner Barrett was suspected to have burnt it.

Upon this evidence the Police Magistrate committed the prisoner for the purpose of his extradition.

*D. B. Read*, Q.C., and *Dr. McMichael*, for the prisoner, took various objections to the proceedings:—The information upon which the Police Magistrate acted was insufficient, and did not authorise him to order the arrest of the prisoner, nor warrant the subsequent proceedings: that the depositions of Patton, Horton, and Fingay, taken in the United States, were not depositions that could be used or received as evidence of the criminality of the prisoner: that if they were receivable they were not properly certified and attested: that the complaint and warrant made before and issued by the Trial Justice were not receivable, being only copies of copies, and that no explanation or proof was given of the duties or authority of a Trial Justice: that it appeared that the prisoner was not guilty of arson, the building set fire to being an unfinished and unoccupied house, and not the subject of arson, and that the warrant under which the prisoner was now detained was insufficient, in not stating whose house the prisoner set fire to.

*John Patterson*, on the part of the Minister of Justice, contended that the depositions were such as could be received, and that they were properly before the Police Magistrate.

MORRISON, J.—The first and most material point for determination is whether there appears upon these papers returned before me, as provided by the statute 31 Vic. c. 94, s. 1, of the Dominion (Reserved Act, see statutes of 32, 33

Vic. p. 12) such evidence, as, according to the laws of this Province, would justify the apprehension and committal for trial of the prisoner if the crime had been committed here. Under the statute it is the duty of the officer (in this case the Police Magistrate), to examine upon oath any person or persons, touching the truth of the charge; and by section 2, in addition, it is provided, that upon the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended.

In this case no oral testimony was given by any witness touching the truth of the charge against the prisoner; all that was done was the laying of an information by an officer, who deposed that he was informed and believed that the prisoner did burn and consume a certain house, without stating whose house it was, on the 19th April, 1869.

The truth of this charge must, therefore, wholly depend upon the depositions upon which the original warrant was granted in the United States. On the argument, it was conceded that, unless the statements or depositions of Patton, Horton, and Fingay, taken before Isaac S. Muse, the Justice of the Peace, on the 13th December, 1869, were receivable and could be read against the prisoner, the case must fail, these depositions containing the only evidence to justify the prisoner's committal.

The original, and the only warrant that appears to have been used in the United States is the one before me, issued on the 20th September, 1869, by one Pettingill, styled a Trial Justice (whom I assume, although no explanation was given at the time, to be an officer like our Police Magistrate), upon a complaint made and addressed to him, that the prisoner on the 18th May, set fire to the dwelling house of one Barrett. As our statute permits depositions taken in a foreign court to be read in lieu of oral testimony, where the case depends wholly upon such depositions,



we must be strict in seeing that they are depositions coming clearly within the meaning and provisions of the 2nd section of the Statute. Now the statements or depositions that were received as evidence of the criminality of the prisoner, and objected to, were made on the 13th December, three months after the original warrant issued. They were not depositions made before the Trial Justice who issued the warrant, but before another officer, a Justice of the Peace. They have no caption, nor do they state or indicate in any way, on their face or otherwise, nor does it appear by any testimony, written or oral, with what object or for what purpose they were made, whether with a view to the issuing of a warrant, or in reference to any antecedent warrant or legal proceedings; they are not certified or referred to by the Trial Justice who issued the warrant, or by the Justice of the Peace before whom they were made. For all that appears, these statements may have been made for some other purpose quite distinct from any criminal charge against the prisoner.

It is to me quite clear, under the 2nd section of the Act, that the depositions that may be received as evidence of the criminality of the prisoner, are depositions upon which an original warrant was granted in the United States, certified under the hand of the person issuing it. Now the statements or depositions in question are certainly not depositions upon which the original warrant was granted, for they were, as I have stated, made several months after, and are not in any way connected with the warrant; and, in my opinion, they were clearly not receivable as evidence touching the truth of the charge, or the criminality of the prisoner; and as without them there was no evidence to justify the committal of the prisoner for extradition, he is entitled to be discharged. Such being the decision I have arrived at, it is quite unnecessary for me to consider or decide the other points raised, some of which, it appears to me, upon consideration, would entitle the prisoner to be discharged.

The prisoner will be discharged out of custody upon this warrant.

*Prisoner discharged.*

BONATHON V. BOWMANVILLE FURNITURE MANUFACTURING  
COMPANY.*Patent—Injunction.*

In an action for an infringement of a patent, an application under the C. L. P. Act for an injunction to restrain the defendant was refused, the patent having been very recently granted, and there being conflicting affidavits as to the rights of the plaintiff to it; and *held* that the plaintiff must establish his title at law before he would be entitled to an injunction.

*Semble* 1.—That the application would also have been refused under the Patent Act of 1869, sec. 24.

2.—That, to entitle a plaintiff to an interim injunction or account, he must waive all claim to more than nominal damages at the trial.

[CHAMBERS, February 11, 1870.—GWYNNE, J.]

This was an application made after appearance and before declaration for an injunction to restrain the defendants from infringing a patent granted to the plaintiff on the 15th October, 1869, in pursuance of the Acts of that year. The patent was for an invention called the “Economical Bending Apparatus,” to be used in furniture making, and was stated in the plaintiff’s affidavit to be an improvement on machines in ordinary use for bending wood, for making chairs and other purposes.

Mr. Green (Patterson & Beaty), on behalf of the plaintiff, contended that the letters patent themselves being granted under the seal of the Commissioner of Patents, obtained after compliance with the formalities required by the Act, afforded a strong presumption in favour of the plaintiff’s right to the invention patented: that no case was made out by defendant’s affidavit throwing any real doubt on the plaintiff’s title; and that, at all events, if the plaintiff was not entitled to an injunction, the defendants should be ordered to keep an account till the trial of the action: 1 Maddock’s Ch. Prac. 191, 192; *Bacon v. Jones*, 4 Mylne & Craig, 433; Patent Act 1869, ss. 24, 25.

*Elmes Henderson*, for the defendants, filed several affidavits made by the manager and workmen of the defendants, to the effect that this process of bending wood was originally introduced from the United States (it was not sworn to be paten-

ted there), into this country, and that the only differences between the process so originally introduced and that patented were a few immaterial improvements in the latter, consisting of a screw being used instead of a wedge, and a few others of a like nature : that these improvements were the result of frequent experiments made during working hours and on defendant's materials by the manager along with the plaintiff and the other workmen of the defendants, when each suggested any improvement that occurred to him ; and it was sworn in all these affidavits, that, in the opinion of the deponents, any one of them would have been as much entitled to the patent as the plaintiff was ; and the manager further swore, that the improvement in the use of the screw before alluded to, which was stated to be the most material improvement introduced by the patent, had been suggested to the plaintiff by the manager himself. He cited *Coryton* on Patents, 321.

GWYNNE, J.—The law of the Court of Chancery as stated by Sir W. Page Wood, V. C., in *Betts v. Menzie*, 3 Jur. N. S. 358, is, that where the patentee has had long enjoyment, then he shall have an injunction to protect his right until trial, even though his right under his patent be doubtful. Here the patent is not only very recently granted, but there are several affidavits filed by the defendants not only to shew that the patented article was in use by the defendants when the patent was granted to the plaintiff, but that the plaintiff acquired his knowledge of the article when hired as a servant of the defendants, employed by them in the course of their business in the use of the article patented, and in experimenting for improvements, which experiments resulted in the very improvements which have been patented. Under these circumstances, upon the authority of *Gardner v. Broadbent*, 2 Jur. N. S., 1041, I refuse to grant an injunction, and consequently any interim account. The summons will be discharged with costs to be costs in the cause to the defendants.

I have regarded the application as made under the

Common Law Procedure Act, but, assuming that a judge in Chambers can act under the Patent Law Amendment Act during Term, and that any judge, other than a judge of the Court in which the action is pending, can make an order under that Act, my decision would be the same in this case.

To entitle a plaintiff to an interim injunction or order for an account under that Act, it would seem that the plaintiff must accept the condition of waiving all claim to recover more than nominal damages at the trial of the action: *Vidi v. Smith*, 3 El. & Bl. 976. In this case I think the plaintiff must establish his title at law before he can obtain the aid of the court by way of injunction or account, the latter being only granted in substitution for the former.

*Summons discharged.*

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#### IN RE POTTER AND KNAPP.

*Arbitration—Notice of meetings—Proceeding ex parte—Duties of arbitrator and dominus litis—Costs.*

*Held*, 1.—That before an arbitrator determines upon proceeding *ex parte*, he should satisfy himself by proper evidence that necessary notice of the appointment has been served, so as to enable the party notified to appear, and, in case of non-appearance, it should clearly be shewn that such absence is wilful; nor should the arbitrator proceed *ex parte* unless the notice conveys the information that *ex parte* proceedings will be taken if the party served does not attend, nor should the arbitrator so proceed if a reasonable excuse is given for such non-attendance.

2. That the party acting in the prosecution of the arbitration ought to take care that all proper notices are served on the opposite party, and should be able to shew, if he desires to proceed *ex parte*, that the other party has been properly notified, and that he wilfully absents himself.

A party, therefore, who had not fulfilled his duty in this respect, was ordered to pay costs, and the case was referred back.

[PRACTICE COURT, H. T., 1870.—GWYNNE, J.]

*O'Brien*, for Knapp, hereafter called the defendant, obtained a rule *nisi*, calling upon Potter, hereafter called the plaintiff, to shew cause why the award made in this cause should not be set aside and vacated upon the following among other grounds, viz:—On the ground of misconduct of



the arbitrator: 1st. In having proceeded with the said reference and heard evidence on behalf of the plaintiff in the absence of the defendant, and without notice to him, and without giving notice to the defendant of the time, if any, fixed for proceeding with the said reference, and without giving the said defendant an opportunity of examining the remainder of his witnesses, or being heard upon the examination of the witnesses of the plaintiff before the said arbitrator, subsequent thereto; and, 2nd, Because the said arbitrator exceeded his authority under the submission, in having assessed the costs of and incidental to the award, and ordered payment of the same.

The rule was founded mainly upon affidavits of the defendant, and one Henderson.

*J. B. Read* shewed cause, and filed four affidavits, namely, of the arbitrator, of *McCrea*, the plaintiff himself, and one *Chase*. He contended that the award should stand, the fault, if any, having been that of the defendant.

*O'Brien*, contra, cited *McNulty v. Jobson*, 2 *Prac. Rep.* 119; *Waters v. Daly*, *Ib.* 202; *Williams v. Roblin*, *Ib.* 234; *In re Manly et al.*, *Ib.* 354; *Russell on Awards*, 179, 191, 199, 207, 655; *Gladwin v. Chilcote*, 9 *Dowl.* 550.

The main facts of the case appear in the judgment of

GWYNNE, J.—It appears from the affidavits that neither plaintiff nor defendant had any person attending the arbitration for them as counsel or attorney, but that they acted each as his own counsel.

Now, from these affidavits, I am to say whether I am satisfied that the defendant wilfully abstained from attending the arbitration, although he had ample notice of its several sittings, and whether the circumstances established by his affidavits, shew that the arbitrator was justified in proceeding *ex parte*, or whether the arbitration was conducted in any part in the absence of the defendant, without his having had that reasonable notice of the proceedings which he was entitled to, and without which the arbitration would be

divested of its judicial character, and the solemn duty of administering justice between parties be degraded into a farce.

I take it to be sufficiently established that the arbitration opened on the 28th May, which day the arbitrator says he formally appointed, by an appointment endorsed on the bond of submission. By reference to this bond, which was filed on the motion to make it a rule of court, I find that this is so, the appointment being dated the 22nd May, for Friday, 28th May, and signed by the arbitrator. Upon the 28th May, it appears that the plaintiff's witness were examined, but whether his case was closed upon that day or upon the 4th June, does not appear; however, there is no complaint made of any of the proceedings of the 28th May. Referring again to the submission, I find an endorsement thereon, also signed by the arbitrator, in these words: "adjourned till Friday, June 4th, by consent of parties, J. Higgins, Arbitrator." So far the proceedings appear regular, and to have been as represented by the defendant.

Upon the 4th June, then, I take it that the plaintiff's case was closed, if it was not closed on the 28th May, and then the defendant's case was opened by the examination of Henderson. Now, the substance of the defendant's affidavit and Henderson's is, that the arbitration upon that day broke off without Henderson's evidence having being closed, and while the defendant had another witness named Buck present to be examined; that there was no adjournment to any other day, and that defendant left, informing both the plaintiff and McCrea that he would expect a notice of the next meeting, whenever it should be appointed. All the affidavits in reply state, on the contrary, that, not only was Henderson's examination completed, but also his cross-examination; and the clerk swears it was taken down in writing, and, when so completed, was signed by Henderson. Now, upon this point, which certainly was a very material point, it would have been very easy, if this were true, for the examination so taken and signed to have been produced; it would no doubt have settled *one* point upon which there

is a very grave contradiction in the affidavits filed by the respective parties.

Then again, all the affidavits in reply concur in saying that there was an adjournment made on the 4th June, after the close of Henderson's testimony, to a future day; the arbitrator, McCrea and Chase stating that day to have been the 11th June, and the plaintiff stating it to have been the 18th June. This *may* be a clerical mistake, and yet, in view of what I am about to advert to, it *may not*. The arbitrator swears that he made a *formal* adjournment to the 11th; McCrea says the adjournment was made unto the 11th June, and that he acted as clerk and noted all the adjournments. Now, referring to the submission upon which the first appointment and adjournment are endorsed, I find no adjournment upon the 4th June endorsed at all, but, under the adjournment *to* the 4th June, I do find an entry of an adjournment, *which is erased*, and which is in the words following: "adjourned June 11th to Friday next, J. Higgins," and the Friday following the 11th June was the 18th June, which is the day mentioned by the plaintiff as the day of the adjournment from the 4th June, so that there may be some colour for something having taken place at some time relating to the 18th June, the day named by the plaintiff; but why is this erased, and why, if the arbitrator did make the *formal* adjournment, which he says he did on the 4th to the 11th, does that not appear on the submission where the other entries of appointment and adjournment, of which there is no dispute, do appear?

Again, if, as McCrea says, he noted down the several adjournments, the production of the minute kept by him would have been very material upon a point as to which also there is such grave contradiction in the affidavits.

Then again, the arbitrator swears that what the defendant said upon the alleged adjournment to the 11th being made upon the 4th June was, "that he did not think he would attend, that I might go on whether he was present or not, that he had no further evidence to put in." McCrea states it in somewhat similar terms, namely, "that *he did not*

*think* he would attend, as he had no more evidence to offer, and it was of no use coming, and that the arbitrator might proceed in his absence." The plaintiff swears that the defendant stated "that *he would not* attend again as he had no further evidence to offer, and that he did *not think* it any use." Now, was Buck there or not in attendance to be examined as a witness by defendant? He swears he was, and no allusion is made to this fact in any of the affidavits filed by the plaintiff, but, assuming that the defendant said what is sworn to by the arbitrator and McCrea, *that he did not think* he would attend; or even what is sworn by the plaintiff and Chase, "that he would not *attend*, *that he did not think it of any use*"—I do not think that an arbitrator in the conduct of a judicial proceeding is justified from such language to proceed *ex parte*, behind the back of one of the parties, without seeing that he had had notice of the future proceedings, so as to give him an opportunity of changing his mind, and of calling more witnesses if he should think fit, or of being present, at least when other witnesses, if any, should be called by his opponent, and of pressing his views equally with his opponent before the arbitrator, if that should have been the purpose for which the meeting was to be held.

Then the next point is, had the defendant any, and if any what notice of the intended proceeding upon the 11th, and had the arbitrator any, and, if any, what evidence of his having had such notice before he proceeded to take further evidence upon the part of the plaintiff.

The arbitrator swears that he directed McCrea to notify both parties of the intended meeting, that he *knows* that McCrea did so by sending notice to plaintiff and defendant; he says he *knows* that McCrea did so, but he gives me no means of testing the correctness of his knowledge. If he *knows* that McCrea sent the requisite notice he must know what information the notice contained, and how it was sent; but he says nothing in his affidavit upon either of these points. Then, McCrea swears that he sent notices as



directed by the arbitrator, but he does not say *how* he sent them; and this is in answer to an affidavit of the defendant, that he lives only two miles off, and that he never received any such or any notice. McCrea, without saying how he sent the notice, contents himself with saying that he sent one to defendant, and that he believes he received it, but he gives me no means of judging of the foundation for his belief, or whether it should outweigh the affidavit of the defendant, who swears that he never received it. The arbitrator, indeed, swears that the defendant acknowledged to him that he had received the notice.

Now, the defendant in his affidavit swears that after he had heard of the award being made, he remonstrated with the arbitrator for having proceeded in his absence, and without having given him notice of his intended sitting of the 11th June; and that the arbitrator replied that he regretted that he had not had notice, but that he could not open the matter, and that he had taken advice upon the subject. Now, did this occur or did it not? it is sworn that it did, and the arbitrator does not deny it. If the allegation of the arbitrator is intended as a denial of the statement in the defendant's affidavit, it is a bald way of denying a very precise and material averment; and if, being uncontradicted, I am to take the defendant's statement in this particular to be true, how am I to understand the arbitrator's reply to the effect that he had acted under advice, upon a point relating to his having proceeded *ex parte* without giving sufficient notice; if he had, *then* the defendant's acknowledgement that he had *received* the notice, or if the arbitrator, as he swears, *knew* that it had been sent *in time*, assuming it even to be true that the defendant did, as the arbitrator swears, *at some time* acknowledge that he had received a notice for the meeting of the 11th, the statement of the arbitrator upon that point is loose enough to be consistent with the fact that the acknowledgement was made after the conversation alluded to by defendant, and that the notice had been so carelessly sent, or sent so late, that he did not receive it until long after the award was made, and

when it was too late to be of any use. But, looking at the preciseness of the affidavit of the defendant upon this point, and the vagueness of the affidavits in reply, I am compelled to adopt the affidavit of the defendant that he never received one; and I am left in doubt whether any was ever sent, or, if sent, whether it was sent in such a manner as to present reasonable expectation that the defendant would receive it in time.

But, further, an arbitrator who acts in the character of a judge, before he undertakes to proceed *ex parte*, should satisfy himself by some proper evidence that the necessary notice not only had been sent, but delivered, so as to enable the party notified to appear, and there is no suggestion that the arbitrator required or called for any such evidence before he entered upon the *ex parte* examination of the plaintiff's witnesses on the 11th June.

Granting that the defendant may have had no further evidence to call, though he swears to the contrary, what right had the arbitrator to suppose that he knew that after his evidence was closed, further evidence would be received from the plaintiff without the defendant having notice of that proceeding. The plaintiff, indeed, swears that the defendant knew that the plaintiff would require to call witnesses to rebut Henderson's evidence. How must the defendant have *known* that? the plaintiff does not pretend that he communicated to the defendant his intention of calling such evidence, and, even though the defendant might be content to be absent at any future meeting, as all his evidence had been given, that reason for his absence will scarcely account for its being supposed that he should not attend if the plaintiff should be permitted to adduce fresh evidence, when we find him attending regularly while all the previous testimony was being taken.

In arbitrations, it is, in my opinion, the duty of the *party* acting in the prosecution of the arbitration, whether he be plaintiff or defendant, to take care that all proper and sufficient notices are *served* upon the opposite party, and it is the duty of the arbitrator, before he proceeds *ex parte*, to

satisfy himself by sufficient evidence that such notices have been given.

Before an arbitrator is justified in proceeding *ex parte*, he ought, in my opinion, to have before him the clearest evidence that the party not attending is wilfully absenting himself; and, when a question arises before the Court as to whether an arbitrator has or has not been justified in proceeding *ex parte*, it is incumbent upon the party who did proceed before the arbitrator, to adduce evidence abundantly sufficient to satisfy the Court that the party absenting himself had full notice of the meeting or meetings from which he was absent, so as to enable the Court to see clearly whether the absence was wilful or excusable, and whether the arbitrator was or was not justified in proceeding in his absence. A very strong case indeed should be made to justify an arbitrator in so proceeding, and it might be well perhaps that it should be established as a rule, that no notice would justify such a proceeding unless it should convey the information that the arbitrator will peremptorily proceed *ex parte* in case the party served with the notice should not attend and the party serving it should, and even in such a case the arbitrator should not proceed *ex parte* if the party served should, before the day of meeting, communicate to the arbitrator a reasonable excuse for his inability to attend.

In this case, I must say that I am not satisfied that the absence of the defendant was wilful. There is reason, I think, to doubt that it was even negligent. I am not satisfied that the matters contained in the affidavits filed upon the motion have been displaced by the affidavits in reply, so as to place the defendant in the position of having committed a wilful default; and I do not think that a sufficient case is shewn to have justified the arbitrator in proceeding in the manner in which he did, *ex parte*. Whatever may be the merits of the case, I cannot say that those due precautions have been observed which alone could justify judicial proceedings being taken or continued against a party in his absence.

I have come to this conclusion upon a careful perusal of

the several affidavits, and a consideration of the abstract principles of justice, with which all who are conversant with the conduct of proceedings in Courts of justice are familiar, without seeking for decisions in like cases, although I doubt not that if it were necessary, abundant authority could be found to support the conclusion at which I have arrived.

As I do not think that the arbitrator's conduct was wilfully improper, but that it proceeded rather from ignorance of the judicial duties of an arbitrator, the rule will be to refer the matter back to the arbitrator, with such enlargements as may be necessary.

I think the plaintiff must pay the costs of this application. It was his duty to see that the enlargements were properly made and notice served before he called upon the arbitrator to proceed *ex parte*.

*Rule accordingly.*

## STACEY V. MCINTYRE.

*New trial to plaintiff on payment of costs—When to be paid.*

When a plaintiff obtains a new trial on payment of costs, he is not bound to pay them before the next assizes, because, even had the costs been paid, the plaintiff could not be compelled to go to trial at such assizes; but he must be *tout temps prist* to pay the costs taxed to defendant.

On 19th June, the judgment for new trial was given, and on 19th August the rule was served, and on the 30th September, the costs were tendered.

*Held*, that the tender was made within a reasonable time.

A rule to rescind a rule for a new trial was therefore discharged, but, as the costs taxed were not paid into Court when this rule *nisi* was served, without costs.

[PRACTICE COURT, H. T., 1870.—GWYNNE, J.]

*O'Brien*, for defendant, obtained a rule *nisi* to rescind a rule granted in Easter Term, 1869, giving plaintiff a new trial on payment of costs, on the ground that the costs taxed under said rule were not paid in accordance with the terms of said rule and the practice of the Court in such cases.

It appeared that the venue in this cause was laid in the County of Elgin, and that the case was tried at the assizes



in and for the said county, on the 8th April, 1869, and that a verdict was then rendered for the defendant on the first count, and for the plaintiff on the second count of the declaration, with fifty dollars damages, and leave was reserved to the plaintiff to move in term to enter judgment for himself on the first count.

In Easter Term last, the plaintiff obtained a rule *nisi* upon the leave reserved, which rule was argued by counsel for both sides during the same term, and judgment thereon was reserved. On or about the 19th June last, judgment on the rule *nisi* was given to the effect that the plaintiff should have a new trial upon payment of costs.

On 19th August last, a copy of the plaintiff's rule for new trial, upon payment of costs, was served upon the Toronto agent of the defendant's attorney, and the copy was forwarded by the agent to the attorney.

On the 24th September last, a letter was received from the attorney for the plaintiff, asking for the bill of the costs so required to be paid by the plaintiff; which was, on the same day, forwarded by post to the Toronto agent of the defendant's attorney for taxation, and upon the same day a letter was written and posted to the plaintiff's attorney, informing defendant that the bill had been so forwarded to be taxed according to the usual course of practice, and on the next day the agent of the defendant's attorney told the agent of the plaintiff's attorney that the bill was ready for taxation.

The costs were not taxed until the 28th of September last, and on the 30th September were tendered to the defendant's attorney, but refused.

The commission day for the fall assizes for the County of Elgin was the 5th October, the last day for notice of trial for the said assizes being therefore the 27th September.

*J. A. Boyd* shewed cause: There is a material difference between an application of this kind by defendant and by plaintiff. The plaintiff was not bound to go down to trial at the next assizes; the defendant could not have forced

him to do so, and consequently the plaintiff was not required to pay the costs previous to the time for giving notice of trial for the first assizes. The plaintiff is not in default, and this rule should be discharged with costs. There is no case directly in point, but *Summerville v. Joy et al.*, 5 Prac. Rep. 144, is an authority in plaintiff's favor; and see C. L. P. Act, sec. 227.

*O'Brien*, contra. The plaintiff having obtained a new trial, on payment of costs, it was his duty to have had the costs taxed promptly and paid forthwith. If this rule is granted, it must be with costs; if not, the plaintiff cannot have costs: *Lush's* Prac. 494; *Rabidon v. Harkin*, 2 Prac. R. 129; *Van Every v. Drake*, 3 *Ib.* 84; *Johnson v. Sparrow*, 1 U. C. R. 397; *Stock v. Shewan*, 18 C. P. 185.

GWYNNE, J.—Upon the principle on which I proceeded in *Summerville v. Joy*, I must hold that the defendant is not entitled to rescind the rule for a new trial, because the plaintiff did not proceed to trial at the last assizes in the County of Elgin. The rule granted to the plaintiff, upon his own application, a new trial upon payment of costs. Had these costs been taxed and paid before the last day for giving notice of trial for the last assizes, there was no process by which the defendant could have compelled the plaintiff to give notice of trial for and to proceed to trial at these assizes: his default in doing so would have given defendant no right to rescind the rule, the costs of which had been paid. He must have proceeded according to the practice of the Court to bring the case down to trial by proviso, or by notice under the 227th section of the C. L. P. Act, whichever is or shall be determined to be the correct practice.

Now, here the plaintiff tendered the costs two days after the last day for serving notice of trial. The defendant refused to accept the costs, thinking he could rescind the rule for the default of the plaintiff in not having given notice of trial, but I think the defendant should have received the costs as tendered. I think they were tendered within a sufficiently reasonable time to comply with the rule, and as

the defendant could not have moved to rescind the rule, if the costs had been paid, so he cannot succeed in rescinding it since he himself prevented the payment by his refusal to accept. But the plaintiff should have been *tout temps prist* since to pay the costs, and if he had, upon this rule being served upon him, brought the taxed costs into court, I should have felt bound to give him the costs of opposing this application; not having done so, I think the proper rule to make, if it should be necessary to issue any rule, will be to make the defendant's rule absolute without costs, unless the plaintiff shall within three weeks pay the taxed costs of the former rule, and in such case the defendant's rule will be discharged without costs.

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REG. EX REL. MCGOUVERIN V. LAWLOR.

*Quo warranto summons—Forfeiture of seat.*

A summons in the nature of a *quo warranto*, under the Municipal Act, is not an appropriate proceeding to unseat a defendant who has forfeited his seat by an act subsequent to the election, the election having been legal.

[CHAMBERS, March 8, 1870.—MR. DALTON.]

This was a summons in the nature of a *quo warranto* under the Municipal Act, complaining of the election of the defendant, as Reeve of the Municipality of the Township of Alfred, in the County of Prescott.

The facts appeared to be, that the defendant filled the office of Reeve for the year 1869: that at the election which took place on the 3rd January last, the defendant was again elected, and accepted office, and afterwards, on the 24th January last, was convicted before two justices "for that he the said George Lawlor, did on the 21st day of December, 1869, at the Township of Alfred aforesaid, sell and barter spirituous liquors without the license required by law," and he was fined \$20, with \$5 costs.

Mr. Clarke (Cameron & Smart) for the relator, claimed that the defendant should be unseated, the defendant having forfeited his seat under 32 Vic. (Ont.) cap. 32, secs. 17, 22, 25.

*W. S. Smith* shewed cause, contending that the act did not cover a case where the election or qualification of the defendant was not called in question, but only matters subsequent thereto; and he alleged matters against the conviction not necessary to be noticed here.

MR. DALTON.—The only cause alleged by the relator for unseating the defendant is the above conviction.

This proceeding, in the nature of a *quo warranto* summons, is entirely statutory. Section 130 of the Municipal Act contemplates the case of the *validity of the election* being contested, and sec. 131, which prescribes the proceeding for the trial, enacts, that if the relator shews by affidavit to the judge reasonable grounds for supposing that the election *was not legal, or, was not conducted according to law, or, that the person declared elected thereat was not duly elected*, the judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested; and, throughout the subsections of sec. 131, the language is consistent. It is said in subsec. 9: *The judge shall in a summary manner upon statement and answer, without formal pleadings, hear and determine the validity of the election.*

Now from the time of his election and acceptance of office to the 24th January, the defendant properly filled the office, because, 1st, the election was legal; 2nd, it was conducted according to law, and 3rd, the defendant declared elected thereat was duly elected. The election was therefore valid, but by his conviction on that day it is alleged that the defendant forfeited his office, which till then he had rightly held. By the 17th sec. (Statutes of Ontario), 32 Vic. cap. 32, it is provided “If any member of any municipal council shall be convicted of any offence under this Act, (which this conviction is), he shall *thereby* forfeit and vacate his seat, and shall be ineligible to be elected to, or to sit or to vote in any municipal council for two years thereafter, &c.”

Whether such a case would, or would not, be within secs. 120, 124 & 125 of the Municipal Act, no doubt the law



affords an appropriate remedy, but the present proceeding is, by express language of the Act, as it seems to me, confined to cases which exclude the cause now alleged, as an objection against the defendant's election.

Judgment should therefore be for the defendant, with costs.

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### ROCHE V. PATRICK.

*Change of venue—Balance of convenience—Fair trial.*

An application to change the venue in an action of libel to a county where the cause of action arose and the witnesses resided, and whereby there would be a great saving of expense was opposed on the ground that a fair trial could not be had in such county, owing to alleged prejudices against the plaintiff, arising from a political excitement occasioned by an election held there three years previously :

*Held*, that the venue must be changed: the action being for a private injury and not a matter of public interest, and the probabilities of the case being against the belief that a fair trial could not be obtained, as alleged, and the preponderance of convenience and expense being greatly in favor of the change.

[CHAMBERS, March 8, 1870.—MR. DALTON.]

This was an application by the defendant to change the venue from the County of Frontenac to the United Counties of Leeds and Greville.

The action was for libel, the plaintiff being the parish priest of the parish in which Prescott is situated. The pleadings in the case were of immense length, there being twenty-four pleas of justification, upon which issues were joined.

The affidavits put in on the motion to change the venue were in substance as follows :

The defendant's affidavit stated, that the publication consisted in the alleged sale by the defendant, in the town of Prescott, of a pamphlet containing the libel : that forty-five witnesses who lived in Prescott, or the immediate neighbourhood, must be called by the defendant : that (he believed) all the plaintiff's witnesses also resided in the town of Prescott, or in the immediate neighbourhood: that Brockville

is distant not more than twelve miles from Prescott, whereas Kingston is more than sixty miles : that the trial at Kingston would cost not less than \$350 more than at Brockville for defendant's witnesses, and that it must necessarily cost the plaintiff more in like proportion for his witnesses : and "that a perfectly fair and impartial trial can be had in the town of Brockville, and that such trial can be had at an expense less by \$500 or \$600 than a trial at Kingston, that is, regarding the extra expense to both parties : and that any political excitement caused by the election referred to in the affidavit of the plaintiff's attorney, had long since died away.

The affidavit of the defendant's attorney was to the same effect.

The affidavits on the part of the plaintiff were made by his attorney, and, as far as seemed important, were to the following effect : that shortly before the publication of the alleged libel an election had occurred in the South Riding of Grenville, at which the defendant was a candidate, and against whom the plaintiff voted : that a few weeks after the election the libel in question was published, as was alleged, and publicly sold by the defendant : that the libel was alleged to have been written by one John Gray, and refers to the part which the plaintiff took in the election, and is supposed to have been written on account of the part which the plaintiff then did take : that the plaintiff was a Roman Catholic priest, and that the part he took in the election, and the influence he was alleged to use over his parishioners, had excited a strong feeling against him in the minds of many of the supporters of the defendant : that all these matters were well known throughout the Counties of Leeds and Grenville, and have been referred to in the public journals : that from the above facts the deponent believed that a large number of the people, especially in the South Riding, were prejudiced for or against the parties, and that a fair trial could not then be had, nor a jury selected which would not contain some men prejudiced on the subject of the action, or who would be likely to agree ; he therefore thought it indispensable to the ends of justice, that the case should be

tried in some other county: that he believed the application to be made, because any jury of those counties would be likely to disagree: that the plaintiff's witnesses reside chiefly about Prescott, and that it would be little more expensive to take them to Kingston than to Brockville.

*S. Richards*, Q.C., for the defendant, urged that the venue should be changed, upon the grounds, that the cause of action arose in Leeds and Grenville: that both parties resided there: that the witnesses on both sides also resided there: and that a trial at Kingston, beside other inconveniences, would cost more than one at Brockville, by an amount between \$500 and \$600.

*John Paterson* shewed cause, and opposed the application upon the grounds that it was not made in time; and that, on account of the prejudice existing against the plaintiff in Leeds and Grenville upon the matters above-mentioned, it would be impossible to obtain a fair trial there.

MR. DALTON.—The plaintiff's first objection is, that this application is not made in time. I think, however, that upon the understanding between the attorneys, as explained by the plaintiff's attorney, the state of the record and the facts which have occurred, that it is in time.

Then as to the principal questions which have been urged. I have read all the cases which I have been referred to, and others. I will state the effect of some of them: *Jackson v. Kidd*, 8 C. B. N. S. 355; Byles, J., says, "To induce a judge to make such an order (to change the venue), three things are necessary; first that defendant's witnesses reside at the place to which it is sought to change the venue; secondly, that the plaintiff's witnesses also reside there, and thirdly, that the cause of the action arose there;" and in the same case Erle, C. J., says, "the principle by which the judges have been guided since the framing of the Common Law Procedure Act is this,—that if it be made to appear that there will be great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of

costs in a trial of the cause at the place to which it is sought to change the venue, the judge is at full liberty to exercise his discretion in the matter and to make the order if he sees fit."

No doubt the plaintiff is *dominus litis*, and it lies upon the defendant to prove the facts necessary to change the venue from where the plaintiff has laid it. There must be a manifest preponderance of convenience in a trial at the place to which it is sought to change it: *Helliwell v. Hobson*, 3 C. B. N. S. 761. All the cases I have referred to on this point are consistent with those I have cited, and now let us apply this rule to the present facts.

Both parties live in Leeds and Grenville, and so do the witnesses of both parties. The cause of the action arose there, and the difference of expense of trial in the two places must be very considerable. How are these facts met by the case of the plaintiff?

I entirely agree with Mr. Paterson, that if it be reasonably established that a fair trial cannot be had in Leeds and Grenville all the above considerations are overborne. Upon this point Mr. Paterson has referred me to an important case, *Penhallow v. The Mersey Dock, &c.*, 29 L. J. Ex. N. S., 21. It was an action against the Dock Company for the loss of a ship by negligence. It was shewn upon the affidavits that the matter had excited great discussion in Liverpool, that almost every merchant and shipowner had made up his mind upon it; and, upon the Court being urged to restore the venue to Liverpool because the cause arose there and because the parties and witnesses on both sides resided there, and that much greater expense would arise from the trial elsewhere, the learned Chief Baron said: "All other considerations must give way to that of a fair trial. The learned Baron who tried the former cause is of opinion that this cause could not be fairly tried at Liverpool;" and the Court refused the rule. But is there any cause to believe that a fair trial cannot be had in this cause in Leeds and Grenville?

The affidavit of the plaintiff's attorney states his belief



that it cannot. The defendant and his attorney are as confident that a fair trial may be had there.

It is necessary to look at the probabilities. The action is for a private injury, not for any matter of public interest, and I cannot bring myself to think that there can be any danger of prejudice arising at the trial from the cause assigned. It would be unfortunate for Canada if the heat of a political contest had such an effect three years after the event, for we have an election every four years. How little the Courts have regarded suggestions alleged to have arisen from such causes may be learned from the language of the judges in *Rex v. Harris et al.*, 3 Bur. 1330; *Seely v. Ellison*, 6 Bing. N. C. 229; and *Dowling v. Sadleir*, 3 Irish Com. Law Rep. 603.

As the balance of convenience is very greatly in favor of a trial at Brockville, and the suggested prejudice to the plaintiff is not established, I must make the summons absolute to change the venue.

*Order accordingly.*

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### COMMERCIAL BANK V. HARRIS.

#### *Issue Book.*

Where pleadings are altered in a material point, it is necessary to serve a new or amended issue book.

[CHAMBERS, March 10, 1870.—MR. DALTON.]

*J. G. Scott*, for defendant, applied to set aside the notice of trial in this case, on the ground that no issue book had been served shewing the existing state of the pleadings.

It appeared that an issue book had been served at an early stage of the suit, but subsequently the pleadings on the files had been altered, some additional pleas having been pleaded, and some of the former withdrawn, and a demurrer had been disposed of before notice of trial was given. Notice of trial

was served without a new issue book being served or the old one amended.

*Crooks*, Q.C., shewed cause.

MR. DALTON.—I think, on the authority of *Woodroffe v. Watson*, 6 Taunt. 400, that the notice of trial is irregular, for the reasons given, and must be set aside.

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### WESTOVER V. BROWN.

*Striking out issues after demurrer.*

A defendant will be allowed, where the plaintiff's declaration is held bad on demurrer, upon payment of the plaintiff's costs of the application and of the replication, to strike out the issues in fact upon some of the pleas, and need not move to rescind the order allowing him to plead several matters.

[CHAMBERS, March 10, 1870.—MR. DALTON.]

*F. Osler* obtained a summons on behalf of the defendant to strike out the issues in fact upon some of the defendant's pleas, the plaintiff's declaration having been held bad on demurrer.

*J. K. Kerr*, contra, objected that the summons should have been to set aside the order allowing the defendant to plead several matters, and not merely to strike out the issues upon those pleas.

MR. DALTON.—In 1 *Wms.* Saund 80, note (1) the editor says: "It seems to follow that when the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in favor of the plea, judgment of *nil capiat* shall be entered, notwithstanding there may be also one or more issues in fact, because upon the whole it appears that the plaintiff has no cause of action. So where several pleas are pleaded, since the stat. 4 & 5 Anne, ch. 16, all of them going to destroy the action, and one or more issues are joined upon some of the pleas, and there are one or

more demurrers to the rest—if the Court determine the demurrers in favor of the defendant *before* the issues are tried they shall not be tried, and if *after* the trial it will make no difference, for in each case judgment of *nil capiat* shall be given against the plaintiff.”

But later authorities shew that in such case the issues would not be struck out against the will of the defendant : *Beckham v. Knight*, 7 Dowl. 409 ; *Carden v. General Cemetery Co.*, *Ib.* 425. For though the defendant may be entitled to enter judgment of *nil capiat* on the whole record, yet here he is not bound to do so. But if the *defendant* wishes to strike out the issues on his own pleas, it can be but a question of costs.

The order obtained to plead several pleas, or to plead and demur, is for the defendant's benefit, and he may waive the advantage to any extent he pleases. He need not plead all the pleas allowed ; after he has pleaded them he may move to withdraw them, and he will be allowed to do so upon proper terms, for he does but waive his own right, and the foundation of the order is not meddled with. Should the plaintiff move to strike them out, no doubt he must attack the order which is the authority to the defendant to plead them.

The present application of the defendant to strike out the issues is simply to be allowed to withdraw his pleas, which he should be allowed to do, upon payment of the costs to the plaintiff occasioned by them, that is, the costs of the replication and of his application.

Courts have gone a good way to prevent the incurring of useless costs. In *MacMartin v. Thompson*, 26 U. C. R. 334, the defendant pleaded the general issue, and a special plea, to which latter the plaintiff demurred. On the trial of the issue the defendant succeeded, and the Court having refused to the plaintiff a rule *nisi* for a new trial, would not hear the argument of the demurrer, which had been set down by the plaintiff ; for the plaintiff having failed on the merits could not be allowed to put the defendant to the costs of an argument, for the mere purpose of getting the costs of the demurrer.

In the judgment, the learned Chief Justice suggested this present proceeding as a proper measure for the defendant to take. This was decided after time taken, and the clauses of the Common Law Procedure Act, as to the costs of several issues, were considered by the court.

*Order accordingly.*

### IN RE RICHARD B. CALDWELL.

*Extradition—Habeas Corpus—Forgery—Warrant—Evidence of accomplice.*

- Held:* 1. It is not necessary under the Extradition Treaty and Act, that an original warrant should have been granted in the United States for the apprehension in this country of the person accused, to enable proceedings to be effectually taken against him in this Province for an offence within the treaty.
2. The evidence of accomplices is sufficient to establish a charge for the purposes of extradition.
3. Where the crime comes within the treaty, it is immaterial whether it is, according to the laws of the United States, only a misdemeanour and not a felony.
4. A magistrate here holding an investigation for the purpose of extradition should not go beyond a bare enquiry as to the *prima facie* evidence of criminality of the accused, and should not enquire into matters of defence which do not affect such criminality.

[CHAMBERS, March 25, 1870—A. WILSON, J.]

A writ of *habeas corpus* was obtained on behalf of the prisoner, directed to the Sheriff of the County of York and others.

The return stated that the prisoner was detained under the warrant of the police magistrate of the City of Toronto, on a charge of forgery committed in the United States, against the laws of that country.

*J. H. Cameron*, Q. C., for the prisoner, urged the following points in favour of his discharge:—

There was no charge made in the United States before or since this charge.

The charge is only on the evidence of an accomplice.

The offence charged is not forgery within the law of the United States.



The charge is not within the treaty, and is condoned by a statute of limitation in the United States, which period (two years) had expired before the charge was made.

See 1 Parker Crim. Rep. 108: *Ex parte Martin*, 4 C. L. J. N. S., 198; 29-30 Vic. cap. 45, sec. 3.

*M. C. Cameron*, Q. C., *contra*.

The remedy is not by *habeas corpus*.

It is not necessary that the charge should have been made in the United States before proceeding here: *Reg. v. Anderson*, 4 C. L. J. N. S., 315; *Ex parte Martin*, *ante*: *The Queen v. Gould*, 20 C. P., 154.

Fugitives from justice are not entitled to the benefit of the limitation claimed, 5 Cranch 37; 1 *Wharton's Am. Law*, sec. 436.

The case was argued before Mr. Justice Adam Wilson, who prepared the following judgment, which, however, was delivered by the Chief Justice of the Common Pleas during the absence of the former learned Judge on circuit.

A. WILSON, J.—It was objected that no charge had been made in the United States against the prisoner for the alleged offence, and that until criminal proceedings had been taken there, none could properly, under the treaty and our statutes passed for giving effect to the same, be initiated here.

The statute of the Dominion, 31 Vic. cap. 94, (Reserved Act; see 32-33 Vic. p. xi.) reciting the treaty, refers to "persons who being charged with the crime of murder, &c., within the jurisdiction of the high contracting parties, should seek an asylum, or should be found within the territories of the other, provided that this should only be done upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed, &c."

The charge may therefore be made within the jurisdiction of either of the high contracting parties, in case the evidence

of criminality, "according to the laws of the place where the fugitive or person *so charged* should be found, would justify his apprehension and commitment for trial if the crime or offence had *been there* committed." The language of the enacting part, (sec. 1) is to the same effect.

I should have thought that the statute permitted a charge to be made here against a person who had committed an offence within the treaty in the United States of America, although no charge had been begun there against the person for that offence, and I should have thought it to be free from all doubt but for the second section of the Act, which enacts, that "In every case of complaint and of a hearing on the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified, &c., may be received in evidence of the criminality of the person so apprehended." The Con. Stat. of Canada, ch. 89, sec. 2, refer to the original warrant, not as the warrant that *was* granted, but which "*may have been granted.*"

I do not, however, consider the statute to require that no charge should be laid here, when the offence has been committed in the United States, until a warrant has been granted there.

The legal functionary is bound to act here "on complaint under oath or affirmation charging any person, &c.," with one of the treaty offences. And when the person charged is brought before the judge or other person who directed the arrest, the judge or other person is to examine on oath "any person or persons touching the truth of the charge; and, upon such evidence as according to the laws of this Province would justify the apprehension and committal for trial of the person accused, if the crime had been committed here, the judge or other person shall issue his warrant for the commitment of the person charged, to remain until surrendered or duly discharged."

The judge or other person acting may proceed upon original *vivâ voce* testimony in like manner "as if the crime had been committed in this province." He may, however, also

receive copies of the depositions on which the original warrant was issued in the United States in evidence of the criminality of the accused.

This, however, is an enabling Act. There is no obligation on the prosecutor to produce such depositions. And I do not conceive that the statute requires that there shall be first such depositions taken, and a warrant granted thereon in the United States, to give jurisdiction to the magistrate here.

The purpose of the statute was to permit the foreign evidence to be made use of here, and not to make it obligatory in the foreign country to have issued a warrant against the offender as a basis for our authority to act.

When once the foreign officers have the person accused surrendered to them for removal from this country, it must be for themselves to justify their detention of the person in their own country.

It may be that in cases of felony there, the detention may be justified by any one in like manner and to the like extent that it may be justified here without a warrant at all. But whether it can or cannot, or whether the offence is there a felony or not, can make no difference here.

Our concern must be to deal with these foreign offences in our own country in like manner as if they had been committed here: to enforce the treaty effectually and in good faith, and to leave all questions of municipal law between the foreign authorities and their prisoner to be dealt with and settled by their own system, with which, in that respect, we have nothing whatever to do.

I am therefore of opinion, that it was not necessary that an original warrant should have been granted in the United States for the apprehension of the person accused, to enable proceedings to be effectually taken against him in this Province, for an offence within the laws of the treaty.

The second objection was, that the direct evidence of criminality was that of two accomplices, and that such evidence was not sufficient to establish the charge without proper corroborative testimony.

I do not attribute much weight to this objection. The evi-

dence of accomplices is admissible, and jurors may when the rule of law with respect to such persons has been explained to them, find a verdict on the evidence of accomplices alone. Justices holding such preliminary investigations, may assuredly do so, when the question is whether the accused shall be put upon his trial or not, and where all such questions, as to how far his accomplices are to be credited, will be duly and at the proper time considered. The objection is not sustainable.

It was thirdly alleged, that the facts did not shew that the offence of forgery had been committed. It appears to me the offence has been sufficiently charged and proved to constitute the crime of forgery.

If it be under the Act of 1823 (see Laws of the United States, Dunlop, p. 678, ch. 38), the offence is a felony.

If it be under the Act of 1863 (see United States Statutes at Large, 37th Congress, ch. 67), the offence will I presume be a misdemeanour.

And if it be under the act of 1866, 39th Congress, ch. 24, it is a felony.

But whether a felony or misdemeanour can be of no consequence—it is nevertheless the offence of forgery, and it is with that alone that the treaty and the statute deal.

It was lastly objected that the accused could not be legally apprehended here upon the charge, because the offence, if committed at all, was committed more than two years before the complaint was made against him, and by the law of the United States, the lapse of two years was a bar to the criminal prosecution.

The period of limitation was denied. It was said to be five years in cases which affected the United States revenue. If it be restricted to the term of two years, then it was said the case must fail.

It was answered on the other hand that it was a matter of defence only, and the defence might be repelled by shewing that the accused was a fugitive from justice.

It appears to me that what the judicial officer in this country has to do, is to determine the *prima facie* criminality



of the accused, so as to decide whether the evidence is sufficient to sustain the *charge* or not.

It is not by any means determined in the United States whether a demurrer will lie, or a motion in arrest of judgment may be made, if the indictment shew the offence to have been committed beyond the statutory period.

The accused is at liberty to take the benefit of the limitation under the general issue and the prosecutor may shew in reply, that the accused is not entitled to the benefit of the protection by reason of his flight from justice.

It appears to me that it will be very inconvenient if the magistrate here is compelled to go beyond the law of enquiry as to criminality.

Suppose some pardoning statute to be relied on—with many exceptions and special provisions—and the accused claims the benefit of it on demand made for extradition. Is the magistrate to try this collateral question, whether the accused is or is not within its provisions, or has or has not forfeited his claim to its protection?

The limitation is a matter of defence; the accused is entitled to the advantage of it by plea, or by some proceeding in the nature of a plea, and he may be precluded from getting the advantage of it by a proper replication, or by counter evidence in the nature of a replication.

It affects his liability to be prosecuted or convicted, it does not affect his criminality.

On the whole, I think the accused should be remanded generally to the custody from whence he came, to abide the decision of his Excellency the Governor-General under the statute.

*Prisoner remanded.*

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## HATCH V. ROWLAND.

*Fi. fa.—Stock in incorporated company.*

*Held*, that stock in an incorporated company is only bound from the time when the notice of the writ is given to the company by the sheriff under Con. Stat. Can. cap 70, ss. 3, 4, and not from the time of the delivery of the writ to the sheriff.

[CHAMBERS, March 10, 1870.—MR. DALTON.]

This was an interpleader summons, obtained by the sheriff of the United Counties of Northumberland and Durham.

On the argument, the parties agreed to waive their right to an issue, and to leave the decision of the question in dispute to Mr. Dalton.

The matter in dispute was a small amount of stock in the Port Hope Gas Company, an incorporated company.

It appeared that on the 24th August, 1863, there were standing on the books of the company five-and-a-half shares of its stock, in the name of the defendant, who on that day transferred the stock to James Clarke. It so remained until the 18th October, 1869, when Clarke re-transferred it to the defendant. On the same day the defendant transferred it to the claimant, both the latter transfers being entered in the stock book of the company. This transfer to the claimant was in satisfaction of a judgment which the claimant had recovered against the defendant.

On the 10th January, 1870, the sheriff of Northumberland and Durham served on the secretary of the company a copy of the writ of *fieri facias* against the defendant's goods in this cause, at the suit of the plaintiff, which was then in the sheriff's hands, and had been in his hands continuously to that time from a day previous to the 18th October, 1869, and gave the notice of seizure, pursuant to sec. 3, cap. 70, Con. Stat. of Canada.

*Rae* appeared on behalf of the sheriff.

Mr. Greene (Patterson & Beatty) for the execution creditors.

*McCaul* for the claimant.

MR. DALTON.—The question is, whether the stock, under the circumstances, was bound from the receipt of the writ by the sheriff; and I think it was not.

By Con. Stat. of Canada, cap. 70, sec. 1, "all shares and dividends of stockholders in incorporated companies shall be held to be personal property."

By sec. 3, the sheriff to whom any writ of execution is addressed, with directions to seize stock, "shall forthwith serve a copy of the writ on such company, with a notice of seizure, &c. ; and from the time of such service, *no transfer of such stock by the defendant shall be valid*, until the seizure has been discharged."

Sec. 4 enacts that if a company has a place of business other than that where such notice has been served, such notice shall not affect the validity of any *transfer* or payment of any dividends or profits duly made and entered at such *other place*, so as to subject the company to pay twice, *or to affect the right of any bona fide purchaser*, until there has been time to transmit the notice.

As the first section of the act (and section 255 of the C. L. P. Act is to the same effect) declares shares to be personal property, and liable as such to be attached, seized and sold under writs of execution, it would probably be held, but for the other enactments of the statute, that the delivery of the writ of *fieri facias* to the proper sheriff would bind the property, as in the case of other personal property ; but the second and third sections seem to shew clearly that such is not the intent. It is the necessary implication that until the seizure, in the manner pointed out in the third section, the receipt of the writ by the sheriff cannot affect the rights of a *bona fide* purchaser, though he may purchase after such receipt. I should understand by the expression, *bona fide* purchaser, a purchaser for good consideration, without notice. I understand the claimant to be such purchaser.

*Robinson v. Grange*, 18 U. C. R. 260, is consistent with this, though it does not expressly decide it.

I must therefore make an order declaring the property to be in the claimant Stanton, and protecting the sheriff as against the execution creditor ; the execution creditor to pay the costs of the sheriff and of the claimant.

*Order accordingly.*

## DONELLY v. TEGART.

*Con. Stat. U. C., cap. 126, secs. 3, 8—Setting aside proceedings—Laches—Jurisdiction of Clerk of Q. B. in Chambers.*

Where, in an application to set aside proceedings (as in the case of an action against a J. P., for acts done under a conviction which has not been quashed), the facts relied upon would be a pleadable bar to the action, laches will not be imputed to the defendant because he does not apply before entering an appearance, though it might if he waited until after the expiration of the time for pleading had expired.

The Clerk of the Queen's Bench sitting in Chambers has clearly jurisdiction to entertain such an application.

[CHAMBERS, April 7, 1870.—MR. DALTON.]

This was a motion to set aside the proceedings against the defendant in this cause, under *Con. Stat. U. C., cap. 126, secs. 3, 8*. The action was in trespass against a magistrate, for acts done under a conviction—which conviction was quashed, but not until after the commencement of this action.

By the 3rd section of the above Act it is enacted that no action shall be brought for anything done under the conviction, until the conviction has been quashed; and the 8th section provides that in case such action shall be brought, a Judge of the Court shall upon application of the defendant, and upon affidavit of the facts, set aside the proceedings.

The dates of the several proceedings did not clearly appear on the affidavits, but it did appear that the time for pleading had not expired.

Mr. Smith (Cameron & McMichael) shewed cause:

Mr. Dalton has no jurisdiction in the case, as the 8th section gives the jurisdiction to a Judge of the Court in which the action should be brought.

The defendant was concluded by his laches, inasmuch as he had not moved to set aside the writ of summons until after the plaintiff had declared.

*John Paterson, contra.*

MR. DALTON.—As to the first point—The 4th and 5th sections of the Act respecting proceedings in Judges' Chambers at Common Law, are perfectly clear as to the jurisdiction. There is jurisdiction.



As to the second point—that there was laches on the part of the defendant in not moving sooner—there is more to be said.

The case of *Moran v. Palmer*, 13 C. P. 450, to which Mr. J. B. Read has kindly referred me as in point here, was an action against a magistrate in which the venue was local under the same statute. Then the C. L. P. Act provides (sec. 8) that where the venue is local the writ of summons must be issued in the county where the venue must be laid. In that case the writ was issued in York, the cause of action being local in Wellington, and the plaintiff in his declaration properly laid the venue in Wellington. After declaration served, the defendant moved to set aside the writ of summons and all proceedings, because it had been issued in York, whereas it should have been issued in Wellington. The defendant's laches was held to conclude him; and it was held he should have moved against the writ before entering an appearance, and his application was discharged. The language of the Chief Justice is very clear :

On this point, he says, at p. 455—"I think the defendant was bound to raise the question as to the writ at the first possible opportunity. If he received a notice of action, that would be some ground on which to apply to a Judge for particulars of plaintiff's demand, and having obtained the particulars, he could then have applied to stay proceedings, because the writ was issued out of the wrong county. I apprehend there is no doubt that particulars could be obtained in an action on the case, and could also be obtained before appearance. All the reasoning which applies to promptness in moving against an irregularity in ordinary cases extends to this. The statute, if applicable, requires the action to be brought within six months from the time of the act committed, \* \* \* and if we set aside the writ the plaintiff's action is gone. \* \* \* Whereas if the defendant had applied promptly, the writ might have been set aside in time to enable him to sue out another. It does not appear to me that in a case like this, any more than in any other case, a defendant can lie by and lull his oppo-

nent into security, and afterwards apply to set aside proceedings which he might have attacked before."

Now, the enactment which applies to the present case is, that "*no action shall be brought*" under the circumstances.

In *Moran v. Palmer* the objection was to practice and the mere manner of proceeding—it did not touch the cause of action—and the defendant was held precluded by the ordinary rule as to laches in cases of irregularity. But here the defect goes to the very cause of action itself—"no action shall be brought."

Suppose that I discharged this summons and the cause went on—if the facts should appear upon proper pleadings *at nisi prius*, as they now appear, what could the Judge do but direct a nonsuit? The words of the statute are so clear that the result is inevitable: there must be a nonsuit or verdict for defendant. If I could agree with Mr. Paterson that the statute affords no other remedy than this application, I should probably have discharged this summons. I should have had, at any rate, to inquire whether the plaintiff, not having moved at an earlier stage, was not precluded now, and the case would have been brought within the authority of *Moran v. Palmer*. But it is not so. The facts shew a defence to the action which is a pleadable bar—fatal to the plaintiff's case at the trial, and this being so, I think laches cannot be attributed to the defendant, as he has moved before pleading. Had he pleaded it might be argued that he had abandoned the right to this proceeding, and had put himself upon the jury. But at any time before that he has a right to claim that the proceedings should be set aside. It is certainly as much for the interest of the plaintiff as of the defendant that they should be.

The order is to set aside the writ of summons and all proceedings—with costs of the action and of this application to be paid by the plaintiff.

*Proceedings set aside.*

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SCOTT V. SCHOOL TRUSTEES OF SECTION ONE IN BURGESS  
AND SECTION TWO IN BATHURST.

*Amending return to writ of execution—Delay.*

*Held*, that the returns to writs of *fi. fa.* and *ven. ex.* lands could be amended so as to make them correspond with the facts (but upon terms), although a sale had been made under them, and after a lapse of over ten years.

[CHAMBERS, April 11th, 1870.—MR. DALTON.]

The plaintiff having obtained a judgment against the defendants caused a writ of *fi. fa.* lands to be issued on the 19th June, 1858, under which a school-house and lot belonging to the defendants was seized on the 15th July, 1859.

A writ of *ven. ex.* lands being issued on this, the sheriff assumed to sell the school-house and lot to the plaintiff for the sum of £60. No money was actually paid. The court of Queen's Bench in an action of ejectment brought by the plaintiff on the sheriff's deed held that nothing passed by it, as the sheriff could not sell the lands of a school corporation (see report of this case in 19 U. C. R. 28.)

The plaintiff took no steps in the matter until the 3rd February, when a summons was obtained on behalf of the plaintiff and the sheriff calling on the defendants to shew cause why the sheriff should not be allowed to amend his return to the writ of *fieri facias* against lands issued in this cause on the 15th day of June, 1858, by making the same as a return that the defendants had no lands in his bailiwick whereof, &c., and why the writ of *venditioni exponas* issued in this cause on the 19th July, 1859, and all proceedings thereunder, and the return made thereto by said sheriff should not be altogether set aside and quashed :

Or why the said sheriff should not be allowed to amend both said returns by making the first a return of lands on hand to the value of one shilling, and the second a return that he had levied and made of the lands of the said defendants the sum of one shilling :

Or why the said sheriff should not be permitted to amend his return to the said first mentioned writ by making the

same a return of lands on hand to the value of one shilling, and why the said writ of *ven. ex.* should not thereupon be amended accordingly :

Or why the said writ of *ven. ex.* should not be amended by inserting therein the return actually made by the said sheriff to the said writ of *feri facias*, and by striking out of the same the recital that the sheriff had taken lands to the value of the damages recovered in this cause :

Or why such other order should not be made, and such relief afforded to the plaintiff, and upon such terms as to the said presiding judge might seem proper.

*J. A. Boyd*, shewed cause :

This application cannot succeed after the great delay that has taken place, and after there has been a change in the ratepayers and in the limits of the school section. The purchaser knew what he was buying, and the maxim *caveat emptor* must apply. See *Corporation of Frontenac v. Corporation of Kingston*, 20 C. P. 49; *Austin v. Corporation of Simcoe*, 22 U. C. R. 73. In case an amendment is ordered the plaintiff must re-convey and pay the costs of the ejectment suit.

*Osler, contra* :

The amendment can be made, and it is not too late; *Bull v. King*, 8 C. P. 474; *Lee et al. v. Neilson et al.*, 14 U. C. R. 606; *Cannan v. Reynolds*, 5 E. & B. 301; *Holmes v. Tutton*, 25 L. T. Q. B. 177; *Webster v. Emery*, 10 Ex. 901; *Cavenagh v. Collett*, 4 B. & Al. 279; *Rex. v. Sheriff of Monmouth*, 1 Marsh. 344; *Rex. v. Sheriff of Wilts*, 8 J. B. Moore 518; *Green v. Glassbrook*, 2 Bing. N. C. 143; *Wood v. Grimwood*, 10 B. & C. 689; *Welsh v. Hall*, 9 M. & W. 14; *Seiwell on Sheriffs*, 384-5; *Ch. Arch.* 1557. The plaintiff is prepared to give a conveyance and register it.

MR. DALTON.—As far as regards this application to amend the sheriff's returns to the writs of execution, it seems to me the case should be looked at as though the defendants



were persons acting in their own right. The matters urged for the defendants, arising from the peculiarity of their position as school trustees, must be considered in another place. The plaintiff will, very likely, find great difficulties in his way when he seeks to levy his debt—perhaps insuperable difficulties—but I do not see that they are proper to be urged against him on this application, which is merely to make the record according to the truth.

The sheriff's return now shews a satisfaction of part of the judgment, which has turned out to be entirely illusory. No money was really made. The sheriff executed to the plaintiff a deed of the school house at a price which the plaintiff bid for it. By that deed nothing passed. The defendants have always held the property, and have used it as a school house without interruption, and as the plaintiff really got nothing, why should an entry which is not true be allowed to remain on the record, that by these means the plaintiff's judgment has been partially satisfied.

When the plaintiff seeks to enforce his judgment, the position of the defendants as trustees, the lapse of time, the change in the school section, and other circumstances will, no doubt, be urged against him. It may be, for all I know, that he will have no remedy—but that is not for me to consider. The question now is whether the additional difficulty, of there being conclusive evidence of satisfaction of part of his debt, which was in truth never made, is to remain in the plaintiff's way.

The sheriff's return should be amended, as it seems to me, upon the plaintiff re-conveying free from encumbrances all interest in the land derived under the sheriff's deed, and upon his crediting on his judgment, the defendants' costs of the ejectment suit, as between attorney and client, discounted at 6 per cent. per annum to the day of the entry of plaintiff's judgment, and upon plaintiff paying the costs of this application.

*Order accordingly.*

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BROWN V. MCGUFFIN.  
GREAT WESTERN RAILWAY CO., GARNISHEES.

*Attachment of debts—Assignment—Notice.*

The judgment debtor, through his sub-contractors, delivered to the garnishees certain railway ties, and gave the sub-contractors an order on the garnishees for all money coming to him therefor. Subsequently to this, but before the garnishees had any notice of the above order, they were served with the attaching order in this case.

*Held*, that the order in favor of the sub-contractors operated as an assignment of the fund to them, although there was no notice of it to the garnishees, they not having been led by the want of notice to alter their position so as to make it inequitable as against them to enforce the assignment.

[CHAMBERS, April 23, 1870.—MR. DALTON.]

This was an application to attach a debt alleged to be due from the garnishees to the judgment debtor.

The facts were, that the judgment debtor delivered to the garnishees 1326 railway ties, through his sub-contractors, Ford and Baker, at one of the stations of the company, under a contract by him to supply the company with a much greater quantity at 25c. per tie.

The garnishees acknowledged to owe the judgment debtor \$331.50 for these ties, less a drawback of ten per cent., which it was agreed should abide the fulfilment of the contract; but as the judgment debtor desired to be released by the garnishees from further performance of his contract, they were willing to pay also the ten per cent. upon receiving proper releases in that behalf from the judgment debtor. The amount less the drawback was \$289.35.

The judgment debtor alleged that the garnishees owed him nothing, and said the ties had never been delivered, but were still the property of Ford and Baker, the sub-contractors who delivered the ties at the station. He annexed to his affidavit a copy of the agreement between himself and Ford and Baker, in which the latter stipulated that the ties to be delivered by them should not be in the possession of the judgment debtor until the payments were made as thereinbefore mentioned, that is, payment at 23 cents per tie for all ties delivered, less a drawback of ten per cent.; and he

further swore that an order on the company was given by him to Ford and Baker, or rather to Wm. McCosh their attorney, entitling him to receive for them all moneys they should be entitled to for ties delivered. This order, he swore, was intended to be given at the execution of the sub-contract, but was not in fact given till the month of February following.

Ford and Baker, in their affidavits, vehemently insisted that they had not delivered the ties, and that the act of the company in inspecting them, and crediting the judgment debtor with the price, was entirely unauthorized by them.

MR. DALTON.—It is plain that the garnishees had no notice, previous to the attaching order, either of the above clause in the agreement between the judgment debtor and Ford and Baker, or of the order in favor of McCosh.

I take it to be clear law, that an attaching order has no operation upon debts of which the judgment debtor has already divested himself by assignment; he must have both the legal and beneficial title.

Two questions present themselves here.

First—Under the circumstances, can Ford and Baker insist that there has been no delivery? They did not before the attaching order inform the company of their position; and they delivered the ties upon the grounds of the company, apparently in performance of the contract of the judgment debtor. Had the company altered their position, as by payment to the judgment debtor, Ford and Baker would have had no remedy.

Several considerations on either side present themselves, and upon the whole, if I were driven to decide upon this point, I should think that Ford and Baker might still assert that the property had not passed from them. But I omit many observations which arise, as I think there is another ground upon which I may more satisfactorily decide the case.

Secondly—Can Ford and Baker assert, or can the judgment debtor assert for them, that the order upon the company is an equitable assignment of the fund in their favour,

sufficient to defeat the claim of the judgment creditors? I think that they can.

In Story's Equity Jurisprudence, secs. 1043-4, 1047, 1047 *a*, it is said that any order, writing, or act, which makes an appropriation of a fund, amounts to an equitable assignment of that fund, and that may be by parol as well as by deed. "But," as is said in sec. 1047, "in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, *for otherwise a priority of right may be obtained by a subsequent assignee*, or the debt may be discharged by a payment to the assignor before such notice."

Very recent cases, however, shew, contrary to what had been formerly held, that as respects *third parties*, notice to the debtor is *not* necessary to perfect the equitable assignment of a debt. In *Watts v. Porter*, 3 E. & B. 743, it was decided by the Queen's Bench, after time taken to consider, that it was necessary, but Erle, J., dissented. That case was decided in 1854, and has often since been observed upon and doubted.

In *Pickering v. Ilfracombe Railway Co.*, L. R. 3 C. P., at page 248, Bovill, C. J., says:—"The last objection urged by the defendant's counsel was that notice of the assignment must be given to the person whose debt is assigned, in order to make the assignment available as against a creditor. The validity of this objection turns upon the doctrine of the courts of equity. As between the assignor and the assignee, it is clear that no notice is necessary. As to third persons there has been some difference of opinion: the majority of the Court of Queen's Bench in *Watts v. Porter*, 3 E. & B. 743, holding that the assignment without notice was inoperative as against a subsequent judgment creditor; but the Lord Chancellor (Cranworth), and Lords Justices Knight Bruce and Turner, in *Beaven v. Lord Oxford*, 22 L. J. Ch. 299, and the Master of the Rolls in *Kinderley v. Jervis*, 25 L. J. Ch. 538, holding the contrary doctrine. \* \* \* If it were necessary to decide between this conflict of authority, I should have no hesitation in agreeing with the opinions of



Erle, C. J., in *Watts v. Porter*, and of the Lord Chancellor, Lords Justices, and Master of the Rolls in the two Chancery cases."

Mr. Justice Willes in the same case, at page 251, expresses similar opinions.

In the same volume, at p. 264, is the case of *Robinson v. Nesbit*, in which the Court of Common Pleas overruled *Watts v. Porter*, and decided that a prior equitable assignment of railway shares in the hands of the garnishee, was a bar to an attachment from the Mayor's Court, London, notwithstanding that no notice of such assignment had been given to the garnishee.

I must hold, then, that the order given by the judgment debtor in favor of Ford and Baker, in February, before the attaching order, operates as an assignment of the fund, though the company had no notice, they not having been led from the want of notice to alter their position, so as to make it inequitable as against them to enforce the assignment. Of the *bona fides* of Ford and Baker's claim there can be no doubt.

It has not escaped me that there is a difference of two cents per tie between the amount payable to Ford and Baker, and the amount payable by the company. But this makes no difference, for the 10 per cent. retainable by the company more than covers the amount.

That 10 per cent. they are willing to pay over upon receiving a release from the judgment debtor of their contract with him; but at present they are not indebted in the amount, and therefore cannot be ordered to pay it over.

As to the costs, the judgment creditor should pay the costs of the garnishees, but not the costs of the judgment debtor.

*Order accordingly.*

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## MACAULAY V. NEVILLE AND MACAULAY.

*Dower—Infant defendant—Appearance.*

An infant cannot appear by attorney, but by guardian. If the appearance is by attorney, all subsequent proceedings are irregular.

An attorney who appears for an infant, knowing of his infancy, will be ordered to pay the costs of all subsequent proceedings, and of the application to set the same aside.

[CHAMBERS, May 6, 1870.—MR. DALTON.]

This was an action of dower, commenced under Stat. Ont. 32 Vic. cap. 7.

The writ was issued on the 27th October, 1869, with the usual notice required by that statute, claiming damages for detention of dower.

An appearance was entered for the defendant Macaulay, by attorney, on the 12th November, 1869, with an acknowledgment of title, and his consent that the demandant might have judgment for her dower under sec. 16 of the above Act.

Other proceedings were thereupon had; and on the 9th April, 1870, interlocutory judgment was signed for the dower, and a suggestion of the claim for damages filed and served.\*

On the 19th April the defendant Macaulay pleaded to the suggestion, and on the same day the demandant signed interlocutory judgment, and served notice of assessment, which was immediately returned by the demandant's attorney, with a letter to defendant's attorney stating that his "judgment is moreover irregular; the defendant, Daniel Macaulay, is an infant, of which I suppose you are aware."

On the 24th day of April, *Osler*, for the defendant Macaulay, obtained a summons calling upon the plaintiff to shew cause why the interlocutory judgment of the 9th April should not be set aside because entitled in the Common Pleas, the action being in the Queen's Bench:

Or why the interlocutory judgment of the 19th should not be set aside, on the ground that it was signed after the plea had been filed to the suggestion;

Or why all proceedings subsequent to the appearance should not be set aside, on the grounds that the defendant was and still is an infant, and could not appear by attorney, and no guardian had been appointed to appear for him.

This summons was served upon the regular agent of the demandant's attorney, who on the following day enlarged the same for several days.

On the 25th day of April, *Kerr*, specially instructed in this matter, and without knowledge of the above application or enlargement, on behalf of the demandant, obtained a summons to set aside the appearance and all subsequent proceedings:

Or for an order on the defendant [Macaulay to appear by guardian, or, in default of such appearance, that a guardian should be assigned to him. And he asked also that the costs of all proceedings should be paid by the attorney who had appeared for the defendant.

Both applications came on for argument together.

*Kerr* shewed cause to the first summons, and supported the second:

\* The application on behalf of defendant must fail, as it is not shewn that it is made with his consent: *Nunn v. Curtis* 4 Dowl. 729. Defendant should go to the root of the irregularity, which was the appearance, and he has not moved against that: *Ch. Arch.* p. 1463.

This objection was waived by the plea filed by defendant.

As to the second objection, the plea filed was inconsistent with the notice filed with the appearance.

After consent under sec. 16, the defendant cannot in any subsequent proceeding deny the demandant's right to dower, and any proceeding denying such right is a nullity. The plea is not an answer to damages, and the right of action is admitted. There remained only an assessment of damages to be made.

The defendant takes advantage of his own wrong, and his attorney admits [in the affidavit filed that he knew of the defendant's infancy when he entered the appearance, but to save costs did not [have a guardian appointed. He cannot now get costs consequent upon his own irregularity.

The second summons is the proper one, and goes to the root of the irregularity in the appearance, and asks for appointment of guardian; even if appearance be set aside, the order should provide for this: *Ch. Arch. Prac.* 1234; *Tidd's Prac.* (9th ed.) 97; *Park on Dower*, 286; *Ross v. Cool*, 9 C. P. 94. And as to costs, the attorney, who is alone responsible, should pay them. He cited also *Paget v. Thompson*, 3 Bing. 609; 11 Moore, 504; *Fountain v. McSween*, 4 P. R. 240; *Carr v. Cooper*, 1 B. & S. 230; *Walker v. Dwyer*, 4 Ir. L. Rep. 364; *Keegan v. Shaw*, Ir. L. Rep. 2 C. L. 637.

*Osler*, supported the first summons, and shewed cause to the second:

The second summons must be discharged, because granted after the first had been enlarged, and proceedings thus stayed. The defendant having first moved, is entitled to an order. No improper conduct is imputed to defendant's attorney, and the demandant must have known of the infancy of defendant, who is her step-son. The proceedings are irregular, and must be set aside: *Jarman v. Lucas*, 15 C. B. N. S. 474. The suggestion was irregular, the defendant having declared: see section 18.

MR. DALTON.—This is a summons by the defendant Macaulay to set aside several specified proceedings, upon grounds of irregularity stated. The only one I think it necessary to notice is that to vacate his appearance in this action, as having been entered by an attorney and not by his guardian,—and as a consequence to set aside all subsequent proceedings as against him.

The summons of the plaintiff is for the same purpose, and for an order on the defendant Macaulay to appear by guardian. But the plaintiff seeks further to charge the attorney for the defendants with 'all the costs which have been occasioned to the plaintiff by the wrongful entry of appearance by the attorney for the defendant Macaulay.

The summons of the plaintiff was taken out after the summons of the defendant was attendable; and it was urged, upon



the argument, that the plaintiff's summons being so attendable, the defendant's summons was necessarily irregular, as having been moved during a stay of proceedings. On the argument I supposed that to be so, but I find that it is not.

The defendant's summons did not seek a stay of proceedings, and does not in its nature call for one; for the defendant is not to take the next step, to be dependent on the result of his summons, and the rule in *Ch. Arch.* 1601, in this respect is clear. I have referred to all the standard works on practice, and I find that they are substantially uniform upon this point.

I have therefore to consider both summonses. The question is really one of costs only, and these are the facts which seem of importance:—

The writ was issued on the 27th October last, and the appearance entered by the attorney on the 12th November. The account given by the attorney of the entry of the appearance is as follows. It is an affidavit in support of his own summons. He says: "That the defendant Daniel Macaulay is, as I am instructed and verily believe, an infant under the age of twenty-one years, but I did not take steps to have a guardian appointed herein for him, with the object of saving expense and trouble, and he, the said defendant, being resident a long distance from the town of Napanee."

Other proceedings took place which I will not detail, and finally, on the 19th April, on returning the issue book and notice of assessment delivered by the plaintiff, he adds to other matters in a letter to the plaintiff's attorney: "Your judgment is moreover irregular, because the defendant Daniel Macaulay is an infant, of which I suppose you were aware."

He knew, then, on the 12th November, the fact of Macaulay's infancy; he knew also, as was suggested on the argument, that it was necessary that an infant should appear by guardian, else why should he assign the expense and trouble as reasons for not appointing one? It is to be presumed, as he is a legal practitioner, that he also knew the consequences to the plaintiff of proceeding upon the appear-

ance. Certainly, if he knew those consequences on the 19th April, and if he did not contemplate them on the 12th November previous, he does not say at what period between those times he became aware of them.

It is observable that he has made no affidavit in answer to the plaintiff's summons, which pointedly seeks to charge him with the costs of the abortive proceedings—where *bona fides* on his part is of material importance to his case—and that when he did give notice on the 19th April, the plaintiff was then necessarily thrown over till the autumn.

On the other hand, the plaintiff and her attorney were neither of them aware of the fact of the infancy of the defendant till the 19th April.

I can draw but one inference from these facts and from what he says and what he does not say—that the attorney *did* know, when he entered the appearance, the effect of that act on the plaintiff's proceedings. Knowing the fact of infancy and the necessity for a guardian, it must at any rate be presumed that he was aware of the direct consequences of entering an ordinary appearance.

There are many English cases, and some in our own Courts, which fully warrant all that the plaintiff here asks. I refer to *Hubbart v. Phillips*, 13 M. & W. 702; *Hoskins v. Phillips*, 16 L. J. Q. B. 339; *Goodright v. Wright*, 1 Stra. 33; *Carr v. Cooper*, 1 B. & S. 282; and to *Merrifield's Law of Attorneys*, pp. 62–5; *Weir v. Hervey*, 1 U. C. R. 430; *Stephenson v. McCombs*, 1 U. C. R. 456.

I have not seen any English cases exactly in point, but Mr. Kerr has referred me to two Irish cases which are so. In *Lessee of Walker et al. v. Dwyer*, 4 Ir. L. Rep. 364, it is held that where an attorney enters an appearance and makes defence to an action brought against an infant before a guardian has been appointed for such infant, the Court will hold him liable for the costs incurred by the plaintiff in setting aside such defence; and in *Keegan v. Shaw*, Ir. L. Rep. 2 C. L. 637; under similar circumstances, the defendant's attorney was ordered to pay all costs; and it surely does seem natural and right that where expense has been

incurred which must fall upon some one, it should be put upon the party whose wilful default has occasioned it.

I therefore order that the appearance of the defendant Macaulay be set aside, together with all subsequent proceedings in the suit; and that he shall appear by guardian in one week from this time; and that the attorney for the defendants do pay the plaintiff all the costs of the proceedings in this suit since the entry of appearance, and the costs of the plaintiff's present application; and I discharge the defendants' application without costs.

*Order accordingly.*

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McPHERSON ET AL. V. McPHERSON.

*Law Reform Act, 1868, sec. 17—Liquidated amount.*

Under the above section no case can be taken down to a County Court for trial unless the amount is ascertained by the signature of defendant—or “liquidated” in the same way.

[CHAMBERS, June 9, 1870.—MR. DALTON.]

The defendant applied to set aside the notice of the trial for a County Court on the ground that the case was not one which could be taken down for trial to a County Court under section 17 of the Law Reform Act, 1868.

The particulars of the plaintiff's claim were as follows:—

1870, March 10.

To 648½ bush. oats delivered here @ 25c.....	\$162 13
To paid freight at your request to Brockville.....	23 00
To paid freight on bags from Montreal.....	0 52
To paid for time sewing bags.....	0 35
	<hr/>
	\$186 00

325 bags delivered f. o. b. here in car No. 757.

There were other similar charges on two subsequent days. No credits were given, nor was the claim ascertained by the signature of the defendant.

*W. S. Smith* shewed cause.

Mr. Muckle (Paterson, Harrison & Paterson) *contra*, cited *Cushman et al. v. Reid*, 5 Prac. R. 121, 20 C. P. 152.

MR. DALTON—The words of section 17 of the Law Reform Act are “liquidated or ascertained by the signature of the defendant.”

Upon consideration, I do not think that the words “liquidated” and “ascertained” are intended to convey different ideas, but are a mere redundancy of expression conveying the same idea, and that “by the signature of the defendant” applies to both, they in fact constituting one condition. Such is evidently the view taken by Mr. Justice Gwynne in *Cushman et al. v. Reid*, 20 C. P. 152, and is the grammatical construction.

It follows that no case can be taken down under clause 17, however clear the nature of the transaction may make the amount of the plaintiff’s claim, unless it be ascertained by the signature of the defendant.

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#### REG. EX REL. HALSTED V. FERRIS.

*Election—Declaration of qualification—29 & 30. Vic. cap 51, secs. 181, 178.*

A defective declaration of qualification of a candidate at a municipal election is not a ground for unseating him by the summary process under the Municipal Act.

[CHAMBERS, June 30, 1870.—MR. DALTON.]

It was sought on this application to unseat the defendant on the ground (amongst others) that he had not taken the declaration of qualification required by the statute. The declaration made was as follows :

“I, Matthew Ferris, do solemnly declare that I am a natural born subject of Her Majesty; that I am truly and *bonâ fide* seized or possessed to my own use and benefit of such an estate, namely : W.  $\frac{1}{2}$  Lot 1, in the Gore, 100 acres ; M. part Lot 6, 2nd range of Gore, 55 acres, as doth qualify me to act in the office of Reeve for the Township of Col-



chester, according to the true intent and meaning of the Municipal Laws of Upper Canada.”

The objection taken on this point was that the declaration was insufficient, inasmuch as it did not specify the nature of the estate claimed by the declarant, &c.; that the defendant could not, under the statute, enter on his duties until he should have made a proper declaration; and that the election of the candidate was not complete until he had done what was necessary to qualify himself for office: 29 & 30 Vic.cap. 51, sec. 178.

*M. C. Cameron*, Q. C., shewed cause.

*O'Brien*, contra.

MR. DALTON.—Nothing can be made of this objection on this application. Whatever might be the effect of the omission to describe the nature of the claimant's estate in a *quo warranto* at common law, it affords no grounds for declaring, in this statutory proceeding, that the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected.

*Judgment for defendant, with costs.*

## MCINNIS ET AL. V. WESTERN ASSURANCE CO.

*Arbitration—Staying proceedings—C. L. P. Act, sec. 167.*

By a condition endorsed on a policy of insurance, the company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators.

An action having been brought on the policy, and an application made under C. L. P. Act, sec. 167, to stay proceedings,

*Held* 1. That the arbitration intended by the condition was not merely a valuation.

2. That the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute.

3. *Per Mr. Dalton*—That the plaintiff was a “party” within the meaning of that section.

Proceedings were accordingly stayed.

[CHAMBERS, July 2, 1870.—MR. DALTON; and on appeal before GWYNNE, J., on July 7, 1870.]

Action on a policy of insurance against loss by fire on certain property of the plaintiffs.

The defendants applied to stay all proceedings in the action under the provisions of the C. L. P. Act, sec. 167, which enacts that when the parties to an instrument have agreed that any difference between them shall be referred to arbitration, and either of them commences a suit against the other, the Court or a Judge may, if no sufficient reason is shewn why such matters should not be referred, order all proceedings in such action to be stayed.

The application was founded on the conditions endorsed on the policy.

The ninth condition provided that "All persons assured by this Company and sustaining loss or damage by fire are to give immediate notice thereof to the secretary or manager of the Company or to the agent of the Company, should there be one acting for it in the neighbourhood of the place where such fire took place, and shall, within thirty days after such loss or damage, deliver to the secretary or manager, or to the agent of the Company, as aforesaid, a full and detailed account of such loss or damage, signed with their own hands, and verified by their oath or affirmation," [here follow certain particulars minutely set forth in the conditions] "and also shall produce such other evidence as to any loss or damage by fire as this Company or its agents may reasonably require. \* \* \* And, whenever required in writing, the assured, or person claiming, shall produce and exhibit his books of account, invoices or certified duplicates thereof, where the originals are lost, and other vouchers, to the assurers or their agent in support of his claim, and permit extracts and copies thereof to be made; and until such proofs, declarations and certificates are produced, the loss shall not be payable; and if there appear any fraud or false swearing in the proofs, declarations or certificates, the assured shall forfeit all claim under this policy. When merchandize or other personal property is partially damaged, the assured shall forthwith cause it to be put in as good order as the nature of the case will admit of, aided by a surveyor of the Company, should the board of directors deem it so necessary; and shall cause a list or inventory of

the whole to be made, naming the quantity and cost of each article. The damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed upon; one half the expenses to be paid by the assurers. And it shall be optional with the Company to replace the loss or damage, and to rebuild or repair the building or buildings within a reasonable time. \* \* And in case differences shall arise, touching any loss or damage, the Company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators, indifferently chosen in the usual way, who shall, before proceeding with the matter, name a third arbitrator, and the award in writing of the said arbitrators, or any two of them, shall be binding on the parties; each party to pay one half the expense of reference and award."

The next condition endorsed on the policy required that "Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved."

The case was brought before Mr. Dalton by consent of the parties.

*C. Robinson, Q.C.*, shewed cause :

1. The plaintiff is not a party to the agreement to refer within the meaning of the C. L. P. Act, sec. 167. The policy is not executed by him.

2. This is not an agreement that any difference between the parties shall be referred, which the statute requires, but an agreement that the Company may refer. The plaintiff could not enforce an arbitration, or stay an action by the insurers. The statute was intended only to give effect to a mutual agreement that neither party should sue, not to the restriction of a power to one party only, as here.

3. The conditions of the policy provide merely for a valuation, whilst the Act speaks of an arbitration.

He cited *Russell* on Awards, last edit., referring to the corresponding section of the Imperial Act; *Cooke v. Cooke*, L. R. 4 Eq. 77; *Vickers v. Vickers*, *Ib.* 536; *Elliott v.*

*Royal Exchange Assurance Co.*, L. R. 2 Ex. 237, referred to in *Griggs v. Billington*, 27 U. C. R. 520; *In re Newton & Hetherington*, 19 C. B. N. S. 342.

*Kerr*, contra, cited *Russell v. Pelligrini*, 6 E. & B. 1020; *Seligmann v. Le Boutillier*, L. R. 1 C. P. 681; *Wickham v. Harding*, 28 L. J. Ex. 215; *Randegger v. Holmes*, L. R. 1 C. P. 679; *Russell on Awards*, 3rd ed., 64, 65; *Scott v. Avery*, 8 Ex. 487; *Avery v. Scott*, 8 Ex. 497; *Scott v. Avery*, 5 H. L. C. 811; *Roper v. Lendon*, 1 E. & E. 825; *Hirsch v. im Thurn*, 4 C. B. N. S. 569; *Braunstein v. Accidental Death Insurance Co.*, 1 B. & S. 782; *Tredwen v. Holman*, 1 H. & C. 71; 31 L. J. Ex. 398; *Elliott v. Royal Exchange Assurance Co.*, *ubi sup.*; *White v. Kirby*, 2 Ch. Cham. R. 416; *Griggs v. Billington*, 27 U. C. R. 535; *Re Anglo Italian Bank & De Rosaz*, L. R. 2 Q. B. 452; *Re Lord*, 24 L. J. Ch. 145; *Vickers v. Vickers*, *ubi sup.*

MR. DALTON.—It is urged by the plaintiff that he is not a “party” in the sense of the clause, because he has not executed. But it is clear that one may be a party to a deed or contract, both substantially and technically, without executing it.

Then it is said that there is no mutuality: that this is not an agreement of the parties to refer, but a mere power to refer reserved by one of the parties.

Mutuality is necessary in the proper sense in every contract. I am not aware of any thing peculiar to a reference in this respect. Both parties have agreed to refer, the defendants by their seal, and the plaintiff by his acceptance of the policy. The circumstances in which there is to be a reference are, 1st. Differences touching loss or damage; and, 2nd. The election of the Company to refer them. In such case both parties have agreed to arbitrate. Before action the Company gave notice.

The great object is to give effect to agreements exactly as parties make them. An action would lie by the Company against the plaintiff for the refusal to refer, but in that the damages would be nominal. It has been assumed that in



argument that these stipulations of the agreement do not give a pleadable defence. If so, I see no "sufficient reason" why the matters in difference should not be arbitrated on, and this application is the only means the Company have of enforcing that power which the contract reserves to them.

I have been referred to several cases as to the distinction between a "valuation" merely and an arbitration. The former is not within the Common Law Procedure Act, section 167. But I think that it is an arbitration strictly which is provided for here, not merely a "valuation." See for the distinction, *Mill v. Bayly*, 2 H. & C. 36; *Bos v. Helsham*, L. R. 2 Ex. 72; *Anglo-Italian Bank v. De Rosaz*, L. R. 2 Q. B. 452; *Re Hopper and Barningham*, *Ib.* 267; *Re Lord*, 24 L. J. Ch. 145.

*Order staying proceedings.*

From the above order of Mr. Dalton the plaintiff appealed to a judge, and the matter was subsequently re-argued by the same counsel before Mr. Justice Gwynne, who, on the 7th July, delivered the following judgment, sustaining Mr. Dalton's order :

GWYNNE, J.—It was agreed that the matter was brought before Mr. Dalton by consent, and no objection therefore was taken as to his jurisdiction to make the order, and it is now agreed that, if necessary, this motion may be treated as before me, not only by way of appeal from Mr. Dalton's order, but also by original application for an order for stay of proceedings upon the same material as was laid before him.

The question arises under a condition endorsed on a policy of insurance executed by the defendants with and in favor of the plaintiffs, and set out above.

It was admitted by both parties that these conditions did not make the ascertainment of the loss by arbitration a condition precedent to any right of action accruing, within the principle of *Scott v. Avery*, 8 Ex. 497, and 5 H. L. Cas. 811; *Roper v. Lendon*, 1 El. & El. 825; *Braunstein v. Acci-*

*dental Death Insurance Co.*, 1 B. & S. 782; *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237. This point having been thus withdrawn from my consideration I express no opinion upon it.

In view of the matters in dispute which have arisen in respect of "merchandize or other personal property partially damaged," and of the general language of the 9th and 10th conditions taken together, I desire merely to guard myself, as the point was not argued, but, on the contrary, waived, from being supposed to express any opinion upon the point.

Mr. Robinson's contention was, that the 167th section of the Common Law Procedure Act did not apply to such a provision in relation to arbitration as that extracted above from the 9th condition endorsed on the policy, for the reason that, as he contended, there was no mutuality, as the plaintiffs could not enforce an arbitration, and whether there should be an arbitration or not rested in the sole will of the defendants.

That the clause was intended to have some effect, there can be no doubt, and that, whatever may be its meaning, it forms part of the contract between the parties comprised in the policy of insurance, there can be no doubt. If the intention of the parties by making this clause a part of their contract was that it should operate in any given event to secure a determination of differences between the parties by an arbitration, then, upon the authority of *Russell v. Pellegrini*, 6 El. & Bl. 1020, 1029, and *Seligmann v. Le Boutillier*, L. Rep. 1 C. P. 681, it must be admitted now that the intention of the clause in the Common Law Procedure Act, was to enable the Courts to carry out contracts, to refer disputes, as far as might be.

Now the condition of the policy provides only for the case of difference between the parties, "touching any loss or damage by fire to the parties insured." From the nature of the contract and of the condition, the assured are the only persons who, in respect of such matter, could be plaintiffs in an action at law, and the assurers are the only persons who

could be defendants in such action, and who could apply to the Court for an order to stay proceedings in consequence of the action being brought in violation of the terms of the agreement to refer. To object then that the agreement is void for want of mutuality by reason of the assured not being placed in a position of being entitled equally with the assurers to the benefit of the 167th section, is to object that there can be no valid agreement in a policy of insurance to refer to arbitration the question touching any loss or damage suffered, if that alone be the matter in difference. What the section contemplates providing for, is the case of an action being brought by a plaintiff, notwithstanding an agreement contained in the instrument for a reference to arbitration in a given event, which, it is contended by the defendants, has arisen. Now I do not see how it can be judicially held that the clause in the 9th condition, relating to arbitration, shall have no effect at all for want of mutuality, because it provides only for a case in which the assured alone ever could be plaintiffs in an action relating to the matter in difference.

The expression in the clause "The Company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators," may not be a felicitous expression, but I think effect can and should be given to it notwithstanding.

This condition being by the policy declared to be part of the contract involved in the policy, it will then read: "It is agreed between the parties hereto that in case differences shall arise, touching any loss or damage, the Company reserves to itself the power," or, "shall have the power of having the loss submitted to the judgment of arbitrators." The plaintiffs agree that the Company shall have the power of having the loss or damage submitted to the judgment of arbitrators.

The agreement in substance is, that in the event of the plaintiffs making a claim for loss or damage from the risk insured against, and in the event of differences arising between the parties as to such loss or damage claimed, and in the

event of the defendants requiring an arbitration, the matters in difference shall be referred. Now, all the events, upon the occurring of which the parties have agreed there shall be an arbitration, have occurred. Some effect surely should be given to this agreement, but there are only two ways in which effect could be given to it, namely, either by holding that the ascertainment of the amount of the loss or damage by arbitration is a condition precedent to any action being brought by the assured in respect of loss or damage claimed, or by holding that the defendants (the assurers) may apply to the Court under the 167th section of the Common Law Procedure Act, in the event of the assured, notwithstanding defendants' request to refer the matter to arbitration, bringing an action to recover the loss or damage claimed; when the Court may, upon being satisfied that no sufficient reason exists why the matters in difference should not be referred to arbitration, according to the agreement in that behalf, cause the agreement to be performed by staying all proceedings in the action. In order to give effect to the intention of the parties, as appearing on the instrument, I think Mr. Dalton has rightly held that the 167th section of the Common Law Procedure Act does apply to this case.

Mr. Robinson further contended, that the matter in difference was a mere "valuation" and not a matter for arbitration; but I think there can be no doubt that the amount of the loss or damage sustained by the plaintiff, whether the mode of ascertaining that amount be called a "valuation," or a "calculation," or "appraisement," or by any other name, is a proper subject for arbitration as much as it is a proper subject for an action. I am of opinion, therefore, that Mr. Dalton's order should be affirmed, or, if desired, I will make an order in like terms, so as to avoid all objection, if any there can be, after consent of parties, as to Mr. Dalton's jurisdiction.

*Order accordingly.\**

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\* An application has been made in the Court of Queen's Bench to rescind this order.—*Rep.*



## MOLLOY V. SHAW.

*Setting aside arrest—Discretion of County Judge—Sufficiency of material—Entitling affidavits.*

*Held*, following *Ellerby v. Walton*, 2 Prac. Rep. 147, that it is not a valid objection to an order to hold to bail, that it was granted upon affidavits which were not entitled in any Court.

A Judge of a Superior Court will not interfere where the County Court Judge has exercised his discretion.

[CHAMBERS, July 12th, 1870.—RICHARDS, C. J.]

On the 2nd of June the defendant was arrested upon a writ of *capias ad respondendum*, issued upon the fiat of the Judge of the County Court of the County of Wellington, and gave bail to the limits.

On the 12th of June *M. A. Dixon* obtained a summons calling on the plaintiff to shew cause why the order to hold to bail, the writ of *capias* issued thereon, the copy and service thereof, and the arrest of the defendant thereunder, should not be set aside with costs; or why the said writ of *capias*, and the copy and service thereof, and the arrest of the defendant thereunder, should not be set aside with costs; or why the arrest of the defendant should not be set aside with costs, and the bail bonds be delivered up to be cancelled, on the following grounds:

1. That the affidavits to hold to bail were not, nor was either of them, entitled in any Court;

2. That the affidavits did not shew or allege a cause of action against defendant by the plaintiff sufficient to authorize the granting of an order to hold to bail;

3. That the affidavits did not shew such facts and circumstances as would justify the granting of the order, on the ground that defendant was about to quit Canada, with intent, &c.;

4. That the defendant was not about to quit Canada with the intent, &c.

*McGregor* shewed cause, and cited *Ellerby v. Walton*, 2 Prac. Rep. 147; *McGuffin v. Cline*. 3 C. L. J., N. S. 290.

*Dixon* contra, cited *Allman et ux. v. Kensel*, 9 U. C. L. J. 80; *Swift v. Jones*, 6 U. C. L. J. 63; *Terry v. Comstock*, 6 U. C. L. J. 235; and the statutes and practice.

RICHARDS, C. J.—I do not feel warranted in setting aside the arrest on the ground that defendant was not about to quit Canada with intent, &c. The learned Judge of the County Court exercised his discretion in the matter, and, on the material produced, I cannot say he is wrong.

As to the defective entitling of the affidavits, *Ellerby v. Walton*, 2 Prac. Rep. 147, is express authority in favor of the plaintiff, and was decided in the full Court. In the face of that decision I do not feel warranted in setting aside the arrest. I have less hesitation in arriving at this conclusion, as the amount for which he was held to bail is not large, and he says he is possessed of property, so that he will have no difficulty in procuring bail. As the last Chamber decision was in favor of the view now contended for by the defendant, I shall discharge the summons without costs.

*Summons discharged.*

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## IN RE EDNEY JANE HOLESLED.

### *Right of custody of illegitimate child.*

- Held*, 1. That the mother of an illegitimate child is not entitled to all the rights of guardian for nurture.
2. That the mother differs only from a stranger in this, that during the period of nurture (under seven) the child may not be separated from the mother by force or fraud.
3. But when she has abandoned the child, and others have adopted it, or if she has placed it under the protection of others, and afterwards claims it as its mother or guardian for nurture, the Court will not recognize such claim as a legal right, but will refuse to interfere, if the interests of the infant will thereby be best protected.

[CHAMBERS, July 28th, 1870.—GWINNE, J.]

A writ of *habeas corpus* issued to bring up the body of Edney Jane Holesled, an infant of the age of three years and ten months, the illegitimate child of Harriet Jane Bellinger, on whose behalf the application was made. The

writ was directed to Richard Swayze, in whose custody the child was.

In 1868 the infant was in charge of Mrs. Bellinger's mother, who, being unable to support it, gave it to Swayze, and he and his wife brought it up since then. In the meantime the infant's mother married a man named Bellinger. Bellinger went to the States, and his wife, who was about to join him, desired to get the child, as he said he would adopt it. She went to Swayze's house, and saw the infant in the yard; she put the child into a sleigh and drove off. Swayze went after her, and re-took the child.

Various affidavits were filed, shewing the above and other facts, but it is not necessary to refer to them at length, as the learned Judge before whom the writ was returned came to the conclusion, so far as the facts were concerned, that the child was adopted by Richard Swayze and his wife with the consent of the child's mother, and the motive for the arrangement was that the mother had neither the means or inclination to support the child.

*W. Sidney Smith*, for the applicant.

The mother of an illegitimate child is *entitled* to the custody, and a Judge has no discretion: see *Bott's Poor Laws*; *Ex parte Knee*, 1 B. & P. N. R. 148; *Tyler on Infancy*, 284; *Bingham on Infancy*; *Commonwealth v. Fee*, 6 Sargent & Rawle, 254; *Carpenter v. Whitman*, 15 Johns. 208; *The People v. Landt*, 2 Johns. 375; *Wright v. Wright*, 2 Mass. Reports, 109; *People v. Kling*, 6 Barbour, 366; *People v. Mitchell*, 44 Barbour, 245.

*Craigie*, for Swayze, *contra*.

A Judge has discretion, and if the mother is shewn to be an improper character, she will be refused the custody.

GWYNNE, J.—The question I have to decide is, whether under these circumstances, upon the application of the mother of the illegitimate infant, I have any discretion to exercise, or must, as a matter of absolute legal right, yield to the application of the mother and order the child to be returned

to her ; for if I have any discretion to exercise, I have no difficulty, upon the affidavits, in arriving at the conclusion that I shall best exercise it for the benefit of the infant by suffering her to remain in the care and under the protection of the persons who have adopted her, and who have hitherto supplied her with all that care and nurture which, in the tender years of infancy, it naturally belongs to a mother to supply.

In *Rex v. Soper*, 5 T. R. 278, it was decided that a father of an illegitimate child of three years of age, and who had obtained possession of the child from the mother *by fraud*, had no right to the possession of the child as against the mother, and the child was accordingly restored to the mother.

In *Rex v. Moseley*, 5 East, 224, in note, the mother of an illegitimate child, aged five years, applied for a *habeas corpus* against the father of the child, who had obtained possession of it by force or fraud. Lord Kenyon granted the rule, saying, “where the father has the custody of the child *fairly* I do not know that this Court would take it away from him, but where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put the matter in the same situation as before.” From this case it would seem that in the judgment of Lord Kenyon the mother of an illegitimate infant, although it is under seven years of age, could not, as a matter of absolute legal right, successfully assert any claim to have the possession of the child, but that as the child was taken from her natural care and protection by force or fraud the Court would interfere so as to put matters in the same situation as they were before the force or fraud was committed.

In *Rex v. Hopkins*, 7 East, 579, Lord Ellenborough doubted whether the Court could interfere at all on behalf of the mother of an illegitimate child “*who had no legal right to the person of the child ;*” but it appearing that the child, which was only three years of age, was by force taken out of the quiet possession of the mother, under whose care and protection it was during the period of nurture, the Court, upon the authority of *Rex v. Soper*, thought proper to restore



the child to the same quiet custody in which it was before the transaction happened which was the subject of complaint.

In *Ex parte Knee*, 1 B. & P. 148, it was held that the mother of an illegitimate infant child of tender years was, as against the putative father, entitled to the possession of the child, unless some ground be laid by affidavit to prevent it.

In *Re Lloyd*, 3 M. & G. 547, the mother of an illegitimate child between eleven and twelve years of age obtained a *habeas corpus* directed to the putative father to bring her up. On the child being produced, the Court held that she might use her own discretion as to where she would go; and, being unwilling to go with the mother, the Court would permit her to remain where she was, and would not permit the mother to take her by force. In that case, during the argument, Maule, J., says: "Suppose she had been brought up on *habeas corpus* at the instance of a stranger, could the Court order her to be given up to him? How does the mother of an illegitimate child differ from a stranger?" Tindal, C.J., says: "If this had been a young child, I should feel no difficulty, for the case would then fall within *Rex v. Hopkins*;" and it being contended upon the authority of *Rex v. Soper* and *Rex v. Moseley* that the Court had authority to deliver the child to her mother, Tindal, C.J., says: "Those cases proceeded on the ground that the putative father had obtained possession of the children by force or fraud and they were infants of tender age."

In *Regina v. Clarke*, 7 El. & Bl. 198, Lord Campbell, C.J., quotes the quære of Maule, J., in *Re Lloyd*, namely: "*How does the mother of an illegitimate child differ from a stranger?*" and adds, "although the relation of the mother to her illegitimate child is recognized for some purposes, it is clear that she has not over it all the rights of guardian for nurture." If she had, she would have been absolutely entitled to the possession of the child in *Re Lloyd*. Lord Campbell, commenting on *Rex v. Hopkins*, says: "From what was said by Lord Ellenborough in *Rex v. Hopkins*, it would appear that it is only while an illegitimate child is

under seven (an age during which the law of nature and the law of the land both say that the child, whether legitimate or illegitimate, ought not to be separated from the mother) that the Courts will interfere to protect the custody of the mother."

In *Re Lloyd*, Tindal, C.J., in giving judgment, says: "Had she (the child brought up on the *habeas corpus*) been under seven years of age, the Court would have said that *she* could exercise no discretion; but she is old enough to choose for herself, and therefore we do not feel called upon to exercise a discretion for her."

These are all the English authorities which I have been able to find upon the subject, and the conclusion which I collect from them is, that it is clear that the mother of an illegitimate child is not recognised in law as entitled to all the rights of guardian for nurture. That in law the mother of an illegitimate child differs only from a stranger in this, that the law holds, in obedience to the law of nature, that during the period of nurture—that is, while the infant is under the age of seven years—it *ought not* to be, and shall not be permitted to be, separated by force, fraud, or stratagem from the quiet possession, care and protection of the mother. But where the mother of an illegitimate child has in the tender years of infancy either abandoned or neglected the child, and others have taken care of it and adopted it, or if the mother has placed it for protection in the hands of persons who have agreed to become in *loco parentium* to it, and she afterwards asserts her right as guardian for nurture, and claims the child in the character of its mother, the Court does not recognise any such right as absolute, nor will it yield to such claim as an absolute legal right, but will exercise its discretion by refusing to interfere, if by so doing the interests of the infant shall, in the opinion of the Court, be best protected.

I have referred to the several American cases which were cited by counsel for the application. They seem to establish that, in some of the States at least, the rights of the mother are completely recognised as absolute, to the utter exclusion of the putative father in all cases. If I had been

influenced by these cases I should perhaps have felt obliged to refuse the application upon another ground equally well established by the American cases, namely, that where the mother of an illegitimate child marries, the natural guardianship of the child devolves upon her husband, who becomes entitled to the custody: *Wright v. Wright*, 2 Mass. Rep. 109; *Tyler on Infancy*, 285; and who therefore ought to be the person to make the application.

The motion therefore is refused.

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IN RE ELIZABETH COOPER AND JANE R. COOPER.

*Coroner's inquest.*

A coroner's inquest held on Sunday is invalid.

[CHAMBERS, July 30, 1870.—GALT, J.]

Writs of *habeas corpus* and *certiorari* were granted by Morrison, J., on the 23rd July, 1870, to bring up Elizabeth Cooper and Jane R. Cooper, who were committed on a warrant charging them with the murder of a child and concealment of birth.

The writs having been returned and filed,

*John Paterson* moved for the discharge of the prisoners, on the ground that they were in the custody of the gaoler on a warrant of commitment made on Sunday, the 22nd May, 1870, by John P. Kay, one of the coroners for the County of Bruce, pursuant to an inquisition indented on that day. The depositions, as appeared by the return to the *certiorari*, were also taken on that day. He cited *Dakins's* case, 2 Saund. 291 a; *Jervis on Coroners*, p. 279; *Boys on Coroners*, p. 167.

Notice of the application was given to the Attorney General, but no one appeared to support the warrant.

GALT, J.—The inquest and inquisition, being judicial acts done on Sunday, appear to me to be void. As therefore there is nothing to support the warrant, the prisoners must be discharged.

*Prisoners discharged.*

## FLOREY V. ROYAL CANADIAN BANK.

*Costs—Election by plaintiff to reduce verdict.*

When a plaintiff, after argument of a rule *nisi* to enter a nonsuit, or for a new trial on the ground of excessive damages, elects to reduce his verdict, instead of submitting to a new trial, with costs to abide the event, he is not entitled to the costs of opposing the rule *nisi*.

[CHAMBERS, August 26, 1870.—WILSON, J.]

A summons was obtained to review the master's taxation of the plaintiff's bill of costs on the following facts :

There was a verdict for plaintiff for \$870. The defendant obtained a rule *nisi* to enter a nonsuit, or for a new trial, on the ground, amongst others, of excessive damages. Upon this rule the court gave the plaintiff leave to elect to reduce the verdict from \$870 to \$494, in which case rule to be discharged ; otherwise there was to be a new trial with costs to abide the event. If the plaintiff should recover more than \$494 then plaintiff should get his costs ; if not, there were to be no costs to either party.

The plaintiff consented to reduce his verdict to \$494, and a rule was made that, "plaintiff consenting to reduce the verdict to \$494, the rule *nisi* is discharged, and the verdict reduced accordingly," &c.

The master held that the plaintiff was entitled to no costs of opposing the rule *nisi*.

*John Paterson* shewed cause, citing *McAndrew v. Adams*, 3 Dowl. 120.

*McMichael*, in support of summons, cited *Delisser v. Towne*, 1 Q. B. 333.

WILSON, J., after taking time to consider, discharged the summons, but without costs, saying the better opinion seemed to be, that no costs ought to go to either party.

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## DAVIDSON ET AL. V. GRANGE.

*Irregularity—Attorney—Vexatious conduct—Affidavit.*

In a writ of *fi. fa.* and the endorsements thereon the plaintiffs were styled defendants, and *vice versa*, the words being transposed throughout, and the Christian names of the defendant were also transposed.

*Held*, that the writ and endorsements were clearly irregular.

Remarks upon the vexatious and oppressive conduct of an attorney in enforcing a levy for costs without any necessity, after an offer of payment in a reasonable time and manner, and upon the introduction of irrelevant and improper matter into an affidavit.

[CHAMBERS, September 1, 1870.—MORRISON, J.]

*Fenton* obtained a summons in this case calling on the defendant to shew cause why a writ of *fi. fa.* issued herein and proceedings thereon should not be set aside with costs for irregularity, and on the ground that the writ was issued with undue haste, &c.

The irregularities were: 1. The plaintiffs were described as defendants; and the defendant as John George Grange instead of George John Grange. 2. The writ purported to be issued by A. L. as plaintiffs' attorney instead of defendant's attorney, and directed the sheriff to levy of the goods and chattels of the defendant, instead of the plaintiffs, such direction purporting to be signed by the plaintiffs' attorney, &c.

And also to shew cause why satisfaction should not be entered upon the judgment roll, upon payment by the plaintiffs of the amount of such judgment, irrespective of the costs of the writ and sheriff's fees, or that such other order might be made in the premises as the judge might see fit.

From the affidavit filed by the plaintiffs' attorney it appeared, that on the 20th November, 1869, a rule for a new trial in this cause was refused, which fact came to his knowledge on the evening of the 22nd: that the following day he was instructed by the plaintiffs to notify the defendant's attorney that the costs would be paid without further proceedings; and on the 24th he wrote the following letter to the defendant's attorneys:—

“TORONTO, 24th Nov., 1869.

“DAVIDSON ET AL. V. GRANGE.

“We are desirous to incur no further expense in this case, and will pay your costs without putting you to trouble of entering judgment. Please send me by return post a copy of your bill of costs, and if we can agree on amount without taxation, we will send you a cheque therefor at once. If we cannot agree on the amount, in forty-eight hours after I receive your bill, I will undertake to attend taxing office to tax costs on receiving one hour's notice, and that a cheque will be given for amount on same day amount of costs is ascertained. Please let me have your bill by next post. Yours &c. F. F.”

No reply was sent, but on the following day the plaintiffs' attorney received notice of taxation for the next morning at 10 o'clock. Mr. P., partner of defendant's attorney, attended the taxation, and admitted receiving the foregoing letter. The taxation proceeded on the Friday and part of Saturday, on which day only one item remained for consideration, \$25 witnesses' fees, charged as paid to the plaintiffs' attorney, which was objected to, and not then allowed by the Master.

The plaintiffs' attorney had to leave for Hamilton before the close of the taxation, intimating his intention to appeal against the allowance of the item of \$25. Before leaving for Hamilton he wrote to Mr. P. the following note:—“It will be unnecessary to issue execution for the costs taxed to you in this cause, as I hereby undertake that the plaintiffs will pay them on receiving notice of the amount; please send me a memorandum of the amount, and I will see to it on my return from Hamilton to night or early on Monday morning.” This note Mr. P. received at 10 minutes to 12 o'clock. On the return of the plaintiffs' attorney that evening, he learned from his clients that the sheriff had made a levy.

It appeared also, that by direction of the partner of the plaintiffs' attorney, his clerk was instructed to get a cheque for the amount from the plaintiffs, which he did. This cheque he took to Mr. P., who was in the office of his Toronto agent. The cheque being payable to Mr. F.'s order he declined to

take it, as it was not endorsed. He was told that Mr. F. would return that evening. It was then suggested that the cheque should be made payable to the order of his Toronto agents, which was declined, as he, Mr. P., required the money. The clerk, notwithstanding, proceeded to obtain the new cheque, but on arriving at plaintiffs' store he found the deputy sheriff there, where he had made a levy under a *fi. fa.* It appeared also that it was only a few minutes after the cheque to Mr. F.'s order was signed that the deputy sheriff made a levy, and that the deputy sheriff stated that it was Mr. P.'s orders to him to put a bailiff in at once. The plaintiffs' attorney's clerk being present he told plaintiff not to pay until Mr. F.'s return, upon which the sheriff said as he had made a levy it need not be paid for a few days. The plaintiffs, who were wholesale merchants in Toronto, swore that they were worth \$30,000 over and above their debts, and generally have on hand \$25,000 worth of goods.

The partner of plaintiffs' attorney stated in his affidavit, that on Saturday he saw Mr. P. between 2 and 3 o'clock, when he stated he would place the *fi. fa.* in the sheriff's hands. He told him that he knew nothing about the matter, it being attended to by his partner exclusively, who would return that evening from Hamilton, and suggested waiting until Monday, as the banks were then closed and the money could not be obtained before Monday. Mr. P. however declined to wait, alleging as his reason for his urgency that he had been treated sharply by Mr. F. in the case and would not wait. He was then requested to delay until he could advise the plaintiffs of the amount of costs and get their cheque, which cheque his clerk got. He also stated that Mr. P. did not affect to doubt or dispute that the plaintiffs were in good circumstances, but he told him his reason for pressing was in retaliation for something that Mr. F. had practised towards him. The plaintiffs' attorney's clerk, among other things, swore that when Mr. P. refused the cheque payable to Mr. F., he, P., suggested that the cheque should be drawn payable to the order of his Toronto agents, but on leaving to get such a

cheque he called after him, saying he would not accept a cheque, he wanted the money. Notwithstanding his saying so, the clerk went to the plaintiffs for a cheque so drawn. But on getting there he found the deputy sheriff with the *fi. fa.*

Mr. P., in reply, filed his own affidavits, from which it appeared that he received Mr. F.'s letter of the 24th instant; but on that date he had made arrangements to enter his judgment, and so he did not reply to it. He also annexed the original note of Mr. F. of the 27th instant, as shewing that he did not intend to object to the revision of the bill. The affidavits contained much matter which the learned Judge in delivering judgment said was immaterial and irrelevant to the merits of the application. In some respects these affidavits contradicted the affidavits filed on the part of the plaintiffs.

The plaintiffs paid to the agents of defendant's attorneys \$204.72, pending this application.

*Harrison*, Q. C. shewed cause.

*Fenton*, *contra*.

The following cases were cited: *Perkins v. National Assurance Association*, 3 Jur. N. S. 371; *Cruickshank v. Moss*, 8 L. T. N. S. 439; *Anon.* 4 Prac. Rep. 242; *Cullen v. Cullen*, 2 Chan. Cham. R. 94; *Reeves v. Slater*, 7 B. & C. 486.

MORRISON, J.—After hearing the arguments an order was made that the bill of costs should be referred to the Master for a revision of the taxation as to the item of \$25, charged and taxed to the defendant's attorney as witness fees, paid him for attendance at the trial of the cause. The Master has since reported his disallowance of that item.

Upon inspection of the *fi. fa.* and its indorsement it is evident that it was taken out in a great hurry; on its face the plaintiffs by name are styled defendants; the true name of the defendant is George John Grange, while in the writ he John George Grange; by the indorsement the writ is issued by Mr. L., styling himself plaintiffs' attorney; and the direc-



tion to the sheriff to levy is to make the amount out of "the within defendants," and signed by Mr. L. (partner of Mr. P.) as plaintiffs' attorney. The writ and indorsement are all irregular. The main point however is in respect to the conduct of the defendant's attorneys.

When the rule *nisi* for a new trial was refused, the defendant was entitled to enter his judgment and to recover his costs. In the case referred to in 4 Prac. Rep. 242, I had to deal with an application somewhat analogous to the one before me, and there I felt it to be my duty to remark upon the conduct of the attorney. The successful party has a right to the entry of his judgment; but, as I said in that case, where the person against whom the execution may issue is desirous of paying the amount so as to avoid the annoyance of a visit from a sheriff's officer and a levy being made on his goods, and gives clear notice that he is willing and ready to pay the amount forthwith, and there is no reason to suspect that he is acting other than *bonâ fide*, and the recovery of the amount is in no way prejudiced;—in the absence of some reasonable excuse, under such circumstances the placing a *fi. fa.* in the sheriff's hands is, in my judgment, *primâ facie* vexatious, and the more so in a case like this, where the amount sought to be recovered was merely costs.

I have read carefully over all the affidavits, and I cannot arrive at the conclusion that the defendant's attorney was justified in the course that he took, for immediately after the rule *nisi* for a new trial was refused, he had a clear intimation that the amount of his costs would be paid when ascertained; and again, after the taxation of costs by the note of the 27th inst., he had a better intimation, with an undertaking from the plaintiffs' attorney that the costs would be paid without further delay, while the obtaining the cheque, although it required the endorsation of Mr. F., indicated the strongest intention and desire of paying the amount. On the other hand, I see not the slightest pretence for the harsh proceeding of instructing the deputy sheriff instantly to make a levy, while it is also evident from the affidavit that the step was taken in retaliation for some alleged sharp practice on the

part of the plaintiffs' attorney, which is no justification, but rather goes to shew that the proceedings so taken were an abuse of the process of the court. I am therefore of opinion that, besides the irregularities appearing on the face of the *fi. fa.*, and in the endorsement thereon, the placing the writ, under the circumstances, in the sheriff's office, and instructing the sheriff at once to place a bailiff in possession, was a vexatious and oppressive act.

I think it proper to notice the way in which the affidavits filed by the defendant's attorney are drawn up. The affidavit should state only facts pertinent to the application, and upon which the party relies ; it is for the court to draw the inferences and judge of their value. An attorney, who is presumed to know better, ought not to make and swear to statements such as I see in one paragraph of his first affidavit. In explaining why a charge was made in the bill for attendance at the trial as the attorney, and \$5 a day as a witness, he says : " It was too absurd to contend that such was meant in the face of my contention, and the affidavit of disbursements made, in which the amount sworn as paid to me, was as witness alone, &c.;" and again in another paragraph, " assuredly it is absurd to presume that after all the efforts I had been making to have the matter settled, before I left town, amicably, that I would have been so discourteous or unreasonable as not to have been quite willing to have shewn every consideration and courtesy had the clerk expressed any willingness to change the cheque or pay the amount. This I wished to do with all candour and fairness."

I see no ground for my assuming that this attorney made efforts to have the matter amicably settled. I can only see that the attorney was acting in the most rigid way to recover his bill of costs (\$25 of which he was not entitled to), and without any excuse for the vexatious proceeding of placing the *fi. fa.* in the sheriff's hands, and inflicting further unnecessary costs on the plaintiffs.

On the whole the order will go to enter satisfaction on the roll ; the defendant's attorney retaining out of the moneys paid in to abide the result of the application, \$179.72, amount

of the judgment after revision of the taxation of costs, and that the defendant refund to the plaintiffs' attorney the surplus, \$25.69, and that the defendant's attorney pay to the plaintiffs' attorney the costs of this application, which I fix at \$10.

*Order accordingly.*

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HARTLEB V. PHELAN.

*Declaration—Irregularity.*

A declaration, which omits the name of the plaintiff in its commencement, is irregular.

[CHAMBERS, September 6, 1870.—MR. DALTON.]

*O'Brien* obtained a summons to set aside the declaration in this case for irregularity with costs, on the ground that the plaintiff's name was omitted in the commencement of the declaration. The declaration commenced thus (after stating venue, date, &c.): "The plaintiff, by ———, his attorney, sues, &c.," nor did the plaintiff's name anywhere appear except in the endorsement on the declaration. He cited *White v. Feltham*, 3 C. B. 658; *Monck v. Northwood*, 2 U. C. L. J., N. S., 268; Har. C. L. P. Act (2nd ed.) p. 100, note *k*.

Mr. Falconbridge (Osler & Moss) shewed cause.

MR. DALTON.—The declaration must be set aside unless the plaintiff amend, which he may do on payment of costs.

*Order, with leave to amend.*

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CAISSE V. THARP.  
BANK OF MONTREAL, *Garnishees.*

*Attachment of debts.*

A sum of money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons to pay over. The order was issued on the 17th of August, thirteen days before the bank agency, where the debtor resided, was advised of the deposit.

*Held*, that the amount could not be attached.

*Semble*, that the father might revoke the gift, and therefore it could not be looked upon as a debt.

[CHAMBERS, September 9, 12, 1870.—MR. DALTON.]

The execution creditor in this case obtained an order attaching a sum of money alleged to be standing to the credit of the execution debtor, in the agency of the Bank of Montreal, at Cobourg.

The proper name of the execution debtor was Frederick S. G. Tharp, but he was sued as Frederick J. G. Tharp, and the money was said to be payable to one J. G. Thorp.

The money had been sent from England by the father to his son, the execution debtor, but there had been no communication between the Bank and the execution debtor on the subject.

*O'Brien*, for the execution debtor, shewed cause :

1. The garnishees are a foreign corporation, and a debt cannot be attached in their hands: *Lundy v. Dickson*, 6 U. C. L. J. 92.

2. There is no debt in fact. The sum of money, even if intended for this debtor, is a gift from the father, and has never been claimed by the son, nor has there been acquiescence by him. The son could not sue the Bank for the money, and the father could recall it.

*Osler*, for the garnishees.

*Dr. McMichael*, for the execution creditor, supported the summons, contending that there was a debt, which could be attached.



MR. DALTON.—I notice only one of the objections made in this case. The judgment creditor is required by the statute to shew that “some person is indebted” to the judgment debtor. It is conclusively established that in such an application there must be a *legal* debt from the garnishee.

The facts shewn in the case are as follows: The manager of the Bank of Montreal, at Cobourg, was notified, on the 30th August last, by the manager at Montreal, that the Cobourg agency was credited by the principal Bank at Montreal with \$389.33, on account of one J. G. Thorp, deposited in the Union Bank of London, in England.

I think it appears that the person named is the judgment debtor, and I take it on the affidavits that the money had been deposited for him as a gift from his father: that on the same 30th day of August, “immediately after” the manager was advised of such credit, he was served with this garnishing order and summons. The order was issued on the 17th August, thirteen days before the Bank at Cobourg was advised of the deposit, and probably before it had been received by the Bank at Montreal. It does not appear when that was. Then surely no debt was shewn when the order was issued. But suppose the order not to have been issued till after the receipt by the Cobourg agency, no communication had been made to the judgment debtor by the Bank, nor even an entry to his credit (so far as shewn) in their books; and if any point is clear at law, I should say it is clear that the depositor in this case could revoke the authority to the Bank to pay the judgment debtor, at any time, until something had occurred to create a privity between the latter and the Bank.

As to whether the Bank could be made garnishees in this proceeding, I do not say anything.

The attaching order and summons to pay over must be discharged, with costs to the garnishees.

*Order accordingly.*

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## IN RE WATTS AND IN RE EMERY.

*Conviction—Sale of liquor contrary to by-law—27 & 28 Vic. cap. 18—  
32 Vic. cap. 32 (Ont.)—Certiorari—Appeal.*

The above persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors and the issue of licenses were prohibited under the Temperance Act of 1864, 27 & 28 Vic. cap. 18, and a memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justices to the accused.

An application for writs of *certiorari* to remove the convictions for the purpose of quashing them was refused; for even if the conviction should have been under the Temperance Act of 1864, and not under 32 Vic. cap. 32 (Ont.), it was amendable.

*Quære*, whether the conviction could not be supported as it stood.

*Semble*, that although 27 & 28 Vic. cap. 18, sec. 36, takes away the right of *certiorari* and appeal, a *certiorari* may be had when there is an absence of jurisdiction in the convicting justice, or a conviction on its face defective in substance, but not otherwise.

[CHAMBERS, September 12, 1870.—GWYNNE, J.]

These were applications for writs of *certiorari* to remove two several convictions, whereby the above named parties were respectively convicted of selling liquor in the township of Ernestown without a license.

The applications were supported by affidavits shewing the summonses, which charged that the accused "did within the last twenty days sell or dispose of intoxicating liquors without the license required by law so to do, and contrary to the by-law of the corporation of the township of Ernestown, prohibiting the sale of intoxicating liquors in Ernestown;" and a memorandum dated 30th July, 1870, which was signed by the convicting magistrates, whereby it was said that after hearing the evidence, they adjudged that each of the above parties respectively is guilty of selling intoxicating liquors in the township of Ernestown without a license within the last twenty days.

There were also affidavits shewing that by-law No. 1, of the year 1870, was passed by the Municipal Council of the township of Ernestown on the 17th January, 1870, whereby the sale of intoxicating liquors, and the issue of licenses for the purpose, is prohibited within the township of Ernestown,

under the authority of the Temperance Act of 1864 (27 & 28 Vic. cap. 18). The affidavits shewed this to be a valid and subsisting by-law, and that it was brought under the notice of the magistrates at the hearing of the respective charges.

The ground of the application was that the memorandum of the justices shewed the convictions to have been under the statute of Ontario, 32 Vic. cap. 32, whereas it was contended that the conviction should have been under the Act of 1864, 27 & 28 Vic. cap. 18.

*McKenzie*, Q. C., for the convicting justices and the prosecution, shewed cause, referring to *Rex v. Justices of Glamorganshire*, 5 T. R. 282; *Rex v. Jefferies*, 4 T. R. 767; *Rex v. Hall*, 1 T. R. 320; *Rex v. Justices of Sussex*, 1 M. & S. 631; *Rex v. Barker*, 1 East 186; 27 & 28 Vic. cap. 18, secs. 1, 12, 13, 16, 32, 36; 32 Vic. cap. 32, (Ont.); *Paley on Convictions*, 169, 288, 416.

*Holmested*, in support of the application, cited *Regina v. Strachan*, 20 C. P. 182; *Re Burrowes*, 18 C. P. 493; 32 Vic. cap. 32, (Ont.), secs. 22, 25.

GWYNNE, J.—The point made in favor of the applicants is, that a person cannot be convicted of selling intoxicating or spirituous liquors without a license in the township of Ernestown, because, by reason of the by-law, the issuing of such license is prohibited.

In my opinion, there is nothing in these cases to justify the issuing of the writ. The statute of Ontario, 32 Vic. c. 32, s. 1, enacts that "no person shall sell by retail any spirituous, fermented, or other manufactured liquors, within the Province of Ontario, without having first obtained a license authorizing him so to do," as provided by the act. The act provides that these licenses shall be issued upon the certificate of the clerks of the respective municipalities, which were empowered to pass by-laws for granting the certificates, and for declaring the terms and conditions upon which the licenses shall issue.

Now, assuming a complaint to be made for selling spirituous liquors without a license, I am not at all prepared to say that a conviction which finds that the accused is guilty of that offence is bad, because he may have adduced evidence which shews not only that he sold the spirituous liquors without a license, but that he could not have obtained a license, because its issue was prohibited by a by-law.

Since the passing of 32 Vic. cap. 32, any sale of intoxicating liquors is in effect illegal as made without license, unless the accused has the protection not only of a license, but also of a by-law of the municipality authorizing the same. Why may not, then, a person be convicted under 32 Vic. cap. 32, for selling without a license when the accused produces a by-law prohibiting, instead of authorizing the issue of a license?

I am not at all prepared to say that there is anything in the point made, even if the magistrates had conclusively prepared and returned their conviction in the terms of their memorandum; but it is said that in fact they have returned a conviction which sets out the by-law and convicts the parties of selling liquor in violation of the by-law.

However, whether this be so in fact or not, I do not enquire; because it is quite apparent that the charge against the accused was of selling liquor without any legal warrant to do so, and in fact in defiance of a law forbidding it. Now, in whatever form the magistrates may have expressed their conviction of that offence, I apprehend, if an appeal be not taken away, that the conviction would be amendable under 29 & 30 Vic. cap. 50, that is, that the charge which was before the magistrates would have to be heard on the merits "notwithstanding any defect of form or otherwise in the conviction," and, if necessary, upon the party complained against being found guilty, the conviction would be amended, so as to conform with the facts adduced. The matter then, if an appeal be not taken away, being capable of being amended on appeal, I do not think that a *certiorari* should issue.

But whether the conviction be under 32 Vic. cap. 32, or



27 & 28 Vic. cap. 18, there is no appeal from this conviction to any court. Now, it would be defeating the object of the statute, if, notwithstanding they declared that there shall be no appeal, still a party should be permitted to remove a conviction for the purpose of quashing it in respect of a matter not appearing upon the conviction itself to be a defect rendering it bad, and which, if the appeal had not been taken away, would have been rectified on an appeal.

I do not think that these writs of *certiorari* should be granted, except in cases where there appears to be an absence of jurisdiction in the convicting justice, or a conviction, upon the face of it, defective in substance.

Here the applicants in substance admit that they have sold spirituous liquors contrary to law; that is, without having such a license as made the act of sale legal. Under these circumstances, I see no way in which they can be prejudiced by the form of the conviction, whatever it may be, even though it be in terms for selling without a license contrary to 32 Vic. cap. 32; and I therefore discharge the summonses with costs, to be paid by the respective applicants, Watts and Emery, to the parties called upon to shew cause.

*Application refused with costs.*

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### SINCLAIR V. CHISHOLM.

#### *Special endorsement.*

A writ of summons was specially endorsed for interest on the balance of an account, and for protest charges on an unaccepted draft.

*Held*, that the endorsement was right as to the interest, but not as to protest charges.

*Bank of Montreal v. Harrison*, 4 Prac. R. 331, explained.

[CHAMBERS, September 15, 1870.—MR. DALTON.]

This was a motion to set aside a judgment for irregularity.

The writ of summons was specially endorsed for the price of

30,000 bushels of wheat.....	\$24,600 00
Less paid .....	23,977 00
	<hr/>
Balance.....	\$623 00
Expense of draft protested.....	1 32
	<hr/>
	\$624 32
	<hr/>

And the plaintiff claimed interest on the latter amount from the 1st June, 1870.

Judgment was signed on default of appearance for the \$624.32, and interest.

It was objected that the interest and the expense of protest were not properly the subject of a special endorsement.

*Harrison, Q. C.*, shewed cause.

*Dr. McMichael*, contra.

MR. DALTON.—First as to the interest. *Smart v. The Niagara, &c., Railway Co.*, 12 C. P. 404, is exactly in point, to shew that this endorsement is warranted as to the interest. The Chief Justice says (p. 406): “It has become so settled a practice to allow interest on all accounts after the proper time for payment has gone by, and particularly upon the balance of an account, which imports that the accounts on each side are made up, and the only difference claimed, that I do not think we should treat the claim for interest as vitiating the special endorsement; and I feel the less inclined to interfere because the objection is patent on the face of the roll, and a writ of error will therefore lie.” That case governs this, though it is true that upon reference to the Master he could not allow the interest on such a claim, though a jury could give it.

Then as to the claim for the expense of protest. It is to be observed that this protest is for non-acceptance, and is

very much like the noting referred to in *Rogers v. Hunt*, 10 Ex. 474. The plaintiff could only recover this item upon a special count, shewing a contract to accept, authorizing his draft, and is in the nature of unliquidated damages. It is not like a case of special endorsement for the amount of a bill or note, and for the expenses of protest for non-payment, in which case the endorsement of the cost of protest would be good: Con. Stat. U. C. cap. 42, sec. 14.

The case of *The Bank of Montreal v. Harrison*, 4 Prac. Rep. 331, when examined, is really a decision, so far as the present point is concerned, that the plaintiff might appropriate payments in a particular way, and nothing more. I have referred to the judgment papers, and the endorsement is simply for \$391.11, the balance due on a bill of exchange, which was surely good.

I do not think it can possibly be held that this sum of \$1.32 could be specially endorsed, nor can it be waived.

The judgment must be set aside, upon payment of 5s. costs, the defendant to bring no action.

*Order accordingly.*

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### MCMURRAY V. GRAND TRUNK RAILWAY CO.

*Short notice of trial "if necessary."*

[CHAMBERS, October 15, 1870.—MR. DALTON.]

By the terms of an enlargement on a summons in Chambers, the defendants were to take "short notice of trial, if necessary."

MR. DALTON.—I understand the words "short notice of trial if necessary" to have reference to the state of the cause, and not to the convenience of the parties so as to authorize any unnecessary delay, even though that convenience may be as to their ability to procure evidence and prepare for trial.

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## BELYEA AND WIFE V. MUIR ET AL.

*Equitable plea.*

Part of the land included in a conveyance was inserted by mistake, the vendor not being, and not pretending to be, the owner of it. To an action on the covenants for title in the deed, the defendant pleaded these facts as an equitable defence.

*Held*, that the plea was good as pleaded.

*Semble*, 1. Where a Court of Equity would give unconditional relief, although the procedure necessary to obtain it is unknown to Courts of Law, the matter of defence can be well pleaded as an equitable plea at law.

2. When a contract has been executed, and nothing remains but the relief to be granted against the existing wrong, a Court of Law can grant it.

[CHAMBERS, October 27, 1870.—MR. DALTON.]

This was an application by the plaintiff for leave to reply and demur to the defendant's plea.

The action was for breach of covenants for title in a deed of conveyance by the defendant to the female plaintiff of part of lot 5 in the 7th concession of the Township of Burford.

The plea, which was pleaded upon equitable grounds, was in substance as follows :

That the real contract between the parties was for the sale by the defendant to the female plaintiff of twenty acres of said lot 5, adjoining two other lots also part of lot 5, which last-mentioned lots were fenced off, and in the visible occupation of their respective owners, the title to which had never been in the defendant, and which he had never assumed to sell, as was well known to the plaintiff: that with those lots the contract had no concern whatever, but respected, as before said, twenty acres adjoining them: that by a mistake of the conveyancer, who was employed by both parties, a portion of the said two lots was included in the description in the deed, which was contrary to the intention of the parties, and to their bargain; so that the deed not only conveyed the twenty acres really contracted for, but also purported to convey a portion of the said two lots: and that the breach in the declaration alleged upon the covenants for title applied not to any portion of the twenty acres, but to



those portions of the two lots, which, but for that mistake, would not have been included in the deed, and should not have been in it at all.

*E. B. Wood*, for defendant, shewed cause. The plea shews that the plaintiff obtained a conveyance of all the lands to which he was entitled, and that he was let into possession of the same, in addition to the lands included in the conveyance by mistake. This mistake is shewn to have been made by the conveyancer employed by both plaintiff and defendant. The trial of this case will do complete justice, and it is therefore unnecessary to have the deed reformed, as is contended on the other side, and the assistance of the Court of Chancery is not required. A court of law can do complete justice so far as required. This court will allow equitable pleas, although the contract does not disclose the true agreement between the parties.

He cited *Borrowman v. Rossel*, 16 C. B. N. S. 68; *Chilton v. Carrington et al.*, 16 C. B. 206; *Fairweather v. Welchman*, 24 L. J. Chan. 412.

*Kerr* supported the summons. The plea is bad. The Court of Chancery would not grant an injunction, as it is not shewn that there was mutuality of mistake, nor that the plaintiff accepted the conveyance in its present shape by a mistake, although it is pleaded that he had notice of the adverse title; and the Court of Chancery would not grant an injunction until they had reformed the deed, and then only on condition of defendant conveying that portion of the land which has not been included in the conveyance.

MR. DALTON.—The plea in this case is carefully drawn, with much circumstance of detail, and is, I think, a good equitable plea at law.

Equitable pleadings at law have now been discussed for many years, and several limitations have been imposed, arising from the different machinery of Courts of Equity and Courts of Law. There are many cases of mistakes in contracts for which no relief can be given at law—as where the

only remedy is to reform the contract, or where from special circumstances the relief would necessarily be qualified with conditions which a Court of Law could not impose.

But I think it is established by clear authority in the cases cited by Mr. Wood, and other cases, that where a contract has been executed, and nothing remains but the relief to be granted against the existing wrong, a Court of Law may grant it as well as a Court of Equity.

And this latter observation seems to me to lead to the true principle to be extracted from the decided cases, upon which such such pleadings at law are to be tested. Would a Court of Equity grant unqualified relief? No matter through what forms that court would act (that is a matter of the practice of the court merely) if in the result it would give unconditional relief, and a Court of Law has in the particular case equal means of testing the truth, then the matter affords a defence at law.

I refer particularly to *Wood v. Dwarrris*, 11 Ex. 493, and I cite a portion of the marginal note to that case:—"Where a plaintiff sues on a written contract, and the defendant pleads as a defence matters which he is in Equity precluded from setting up, by a term of the contract not stated in the written instrument, a Court of Law may, under the C. L. P. Act, give equitable relief without the instrument being first reformed." And I particularly cite *Collett v. Morrison*, 9 Hare 162, where a term of the agreement was left out of a life policy, and Vice-Chancellor Turner decided the case upon the footing of the agreement, and not of the policy, without putting the parties to reform the policy.

Now, what is the case here? The conveyance was made some years ago; the plaintiffs have had full possession of, and title to all they bargained for. The consideration has been paid, and the plaintiffs have nothing they can justly seek from the defendant. What remains is that the defendant should be relieved from a claim now unjustly made, arising from a mistake in drawing the deed.

That, I think, a Court of Law can grant, and therefore I think this plea good.

## LEEMING V. MARSHALL.

*Affidavit—Interlineation.*

An interlineation in an affidavit, not noted by the commissioner, does not necessarily avoid it.

[CHAMBERS, November 1, 1870.—MR. DALTON.]

*J. B. Read* applied to set aside the copy of declaration served and all subsequent proceedings for irregularity, with costs, on the ground that at the time of service no declaration had been filed in the office from whence the writ was issued.

One of the affidavits on which the summons was obtained, put in to shew that no declaration had been filed, had these words interlined without being noted by the commissioner : “At which office the writ in this case was issued.”

*J. H. McDonald* shewed cause, and objected to the above affidavit on the ground that the interlineation was material, and was not initialed by the commissioner, as required by the practice : *In re Fagan*, 5 C. B. 436.

*J. B. Read*, *contra*.

MR. DALTON.—The order must be made, as asked, to set aside copy of declaration served, with costs.

The practice referred to in *In re Fagan*, 5 C. B. 436, has not prevailed in this country : *Lyster v. Boulton*, 5 U. C. R. 632.

*Order accordingly.*

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COCKBURN V. RATHBUN ET AL.*Declaration before appearance*

An attorney who should have entered an appearance for defendants on the 22nd did not do so until the 25th. On the 24th the plaintiff filed and served declaration. The defendants, by the same attorney, then applied to set aside the copy and service of declaration on the ground that at the time of declaring no appearance had been entered, but *Held*, that, as the attorney had authority to act as such, the service could not be set aside.

[CHAMBERS, November 1, 1870.—MR. DALTON.]

The summons in this case was to set aside the service of the declaration, or the copy and the service, or one or both,

and the notice to plead served on the agents of the defendants' attorney, or the attorney for the defendant, Hugo B. Rathbun, with costs, as irregular, on the ground that no appearance was entered on behalf of the defendants by the said attorney at the time of such service; and also on the ground that neither the writ of summons, nor judge's order, nor affidavit pursuant to sec. 56 of the C. L. P. Act was filed with a copy of the declaration filed, and on the ground that the plaintiff had no authority to serve the said attorney or his agents as attorney for the defendants, and on further grounds disclosed in affidavits and papers filed.

The only affidavit filed was that of the defendants' attorney himself, sworn on the 26th October, wherein he stated that he was the attorney of the defendants in the cause: that on the 13th October, the summons was personally served on the defendant Edward Rathbun, by the Sheriff of Hastings, and that he, the attorney, on that same day, accepted service of the summons for the defendant Hugo, the writ not being specially endorsed: that on the 24th of October the declaration and notice to plead were served on deponent's Toronto agents, as he was advised by letter enclosing the declaration, received by him on the 25th: that no appearance were entered for either of the two defendants until the 25th of October, when deponent caused an appearance to be entered for both defendants; that when the said declaration was served on the agents (on the 24th) there was no appearance entered for the defendants, or either of them, by deponent as their attorney.

*Osler*, shewed cause.

*Lauder*, contra.

MR. DALTON.—As to the bearing of these facts upon the present application, it is to be observed that the declaration itself and the filing of it are not attacked by the summons; it is the copy and service that are sought to be set aside. The summons assumes, therefore, that the declaration itself



and the filing are regular. Whether they are so or not, I have not to enquire.

Is the service, then, on Mr. Holden good as to both defendants?

The appearance was due by both defendants on the 22nd of October. Mr. Holden, it is evident, was then attorney in fact for both defendants—in truth, there is no objection that he was not such attorney, but the objection is that he had not entered an appearance when the declaration was filed and served. As respects the defendant Hugo, for whom he accepted service on the 13th, I think he then became bound, as between himself and the plaintiffs, to enter the appearance on the 22nd. Evidently he was Hugo's attorney from the 13th. The facts shew that he was equally the attorney of the other defendant. And I understand he makes this application as attorney for both defendants.

Supposing then he had not entered an appearance, or never enters an appearance, he is still the attorney of the defendants; and the only ground upon which, as I take it, this service could be set aside, would be the actual want of authority in Mr. Holden to act as attorney.

I have regarded very strictly the application to set aside the service of this declaration, as I think it my duty under the circumstances to do so; and as the summons is moved with costs, I must discharge it with costs.

*Summons discharged.*

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THE TOWNSHIP OF WALSINGHAM V. THE LONG POINT  
COMPANY.*Assessment—Appeal—Statute labour—Jurisdiction of County Judge.*

An island forming part of a municipality, but situated in no road division, and deriving no benefit from the roads of the municipality, having been assessed for statute labour, the owners appealed to the County Judge, on the grounds of over assessment, and that the property was not liable to statute labour. On an application to stay proceedings before the Judge, *Held*, that though a County Judge has authority to increase or reduce an assessment, or to rectify errors in or omissions from the roll, the question of liability for statute labour is beyond his jurisdiction. A writ of prohibition was accordingly granted.

[CHAMBERS, November 24, 1870—GALT, J.]

A summons was obtained on behalf of the Township of Walsingham calling upon the Long Point Company and the Judge of the County Court of the County of Norfolk to shew cause why a writ of prohibition should not issue, prohibiting and restraining the said Judge and the said company from proceeding before the said Judge in the matter of an appeal by the said company from the Court of Revision for the Township of Walsingham, so far as the said appeal relates to statute labour, and to the liability of said company to perform statute labour in road division No. 4 in said Township, on the ground that the said Judge had not and has not any jurisdiction to entertain such appeal, so far as the same relates to statute labour.

By a resolution passed by the Municipal Council of Walsingham, on the 21st February, 1870, it was resolved that road division No. 4 should be held to include the whole of Long Point, and that all persons, either resident or non-resident on said Long Point, liable to perform statute labour, should perform the same in said road division No. 4, unless commuted for in money, in which case the proceeds thereof should be expended in the said division No. 4, until otherwise ordered by the Council. The Long Point herein mentioned was the property of the Long Point Company, and it appeared from the papers filed on this application that this was the first time that the property in question was included

in any road division or assessed for statute labour. In making up the assessment roll for this year, the assessors served a notice of assessment, stating the number of acres to be 14,300, the value to be \$8,500, and the number of days of statute labour 30, in accordance with the rate established by sec. 83 of 32 Vic. ch. 36.

From this assessment the company appealed to the Court of Revision, which dismissed the appeal, and thereupon the company appealed against the decision of the Court of Revision to the judge of the County Court, on the following grounds :

1. That the property of the said Long Point Company is not liable for the performance of statute labour, on the grounds that it is in no road division in the said township, and that no roads are within a reasonable distance thereof, upon which statute labour can be performed, and that the assessment of the same for statute labour is contrary to law.

2. That the property of the said Long Point Company is over-assessed, and at a higher proportionate rate than other property in the said township of Walsingham.

3. That the assessment of the said company's property is excessive, improper and unlawful.

4. That the proceedings of the said Court of Revision were unlawful and imperfect.

This appeal was heard by the learned Judge on the 20th of June, and on the 9th of July he gave judgment reducing the assessed value of the lands of the company to \$7,000, and directing that the statute labour assessed against the lands of the company should be struck out, and the assessment roll of the said township amended accordingly. This judgment was as follows :

“The matter of appeal may be substantially divided into two heads.

- 1st. Over assessment on the value of the property,

- 2nd. The liability of the property of the company, as situated, to be assessed for statute labour.

As to the first point, it appears from the evidence that the property of the company was assessed for \$5,200 in 1868,

that being the first year of their ownership. In the following year it was raised to \$7,000, when a general increase was made in the assessed value of all the property in the township. This year, 1870, it is again sought to be raised to 8,500, although the evidence shews that no general increase has been made in the assessed value of the property in the municipality, but if anything rather a decrease. It seems that the ground is kept as a shooting and trapping preserve, where game and fur are protected, and that it is unremunerative to the proprietors in a pecuniary point of view, costing them more yearly than the revenue derived from it.

From the evidence of value and other matters proved, I am satisfied that \$7,000 is the full assessable value of the said property, and I therefore reverse the decision of the Court of Revision upon that point, and decide, and direct, that the said property shall be assessed for the sum of \$7,000, and no more, and that the assessment roll of the township be amended accordingly.

As to the second point, I find that the property of the Company consists of an island composed of land and marshes, the nearest part of which is three or four miles and the farthest part twenty-five miles from the road division in which the council has placed it. I find that no roads built over the main land would be of any service, value, or benefit to the property of the company. It does not, therefore, seem reasonable or just that the property should be laid under a burthen which will, under no circumstances, produce a benefit to them; and upon examining the Assessment Act and the Municipal Institutions Act, while I find that power is given to municipal councils to divide the municipality into road divisions, I also find that every resident shall have the right to perform his whole "statute labour in the statute labour division in which his residence is situated, unless otherwise ordered by the council:" (see sec. 89), and also, "in all cases, when the statute labour of a non-resident is paid in money, the municipal council shall order the same to be expended in the statute labour division where the pro-



perty is situated, or where the said statute labour tax is levied :” (see sec. 88). It seems to me, therefore, that the council, though they have the power to regulate and make the road divisions, must exercise such power in a reasonable manner, and that it would be unjust and absurd to contend that they have the power to order a man to come twenty-five miles to perform his statute labour, or that they can so make road divisions that property can be taxed for roads which cannot by any possibility be of any service, value, or benefit to the property. Such contention is certainly unreasonable, and it appears to me totally at variance with the spirit and intention of the Assessment Act.

I therefore reverse the decision of the Court of Revision on the second point also, and direct that the statute labour assessed against the lands of the said company be struck out, and the assessment roll of the said township amended accordingly. And I direct the respondents to pay the costs of this appeal.”

GALT, J.—There is no question as to the jurisdiction of the learned Judge to reduce the amount of the assessed value of the lands, but the point raised on the present application is whether he had any jurisdiction to entertain the question as to the liability of the company to statute labour. That is regulated by the 83rd section, and is a mere matter of computation on the assessed value of the property ; but the point in dispute was the liability to perform statute labour at all, and this in my opinion is not the subject of appeal, either to the Court of Revision, or from their decision. Section 60 of the Assessment Act of 1869 regulates the proceedings for the trial of complaints. Sub-section 1 is as follows :—“ Any person complaining of an error or omission in regard to himself, as having been wrongfully inserted on, or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll, may personally, or by his agent, within fourteen days after the time fixed for the return of the roll, give notice in writing to the clerk of the municipality, that he considers himself aggrieved for any

or all of the causes aforesaid." Sub-section 2 is: "If a municipal elector thinks that any person has been assessed too low or too high, or has been wrongfully inserted on or omitted from the roll, the clerk shall, on his request in writing, give notice to such persons and to the assessor of the time when the matter will be tried by the court, and the matter shall be decided in the same manner as complaints by a person assessed." These are the only sub-sections to which it is necessary to refer in considering this question, and from these it appears to me that the subject matters of complaint are confined to overcharge and undercharge as respects value, and the entry on or omission of a person from the roll. These then are the only matters from a decision upon which an appeal lies to the County Judge. There can be no appeal as regards the question of statute labour, as a separate and distinct complaint, for the reason already given, namely, that the amount of statute labour is regulated by the assessed value of the property by section 83. I am therefore of opinion that the learned Judge had no jurisdiction to decide the question as to whether the company were properly entered on the assessment roll as liable for statute labour. By section 332 of the Municipal Act of 1866, authority is given to township councils to pass by-laws "For regulating the manner and the division in which statute labour or commutation money shall be performed and expended;" and if such by-law is unjust or improper steps should be taken to have it quashed. The municipal council of the township of Walsingham did, by the resolution of the 21st of February, 1870, regulate the manner and the division in which statute labour as regards the land in question should be performed, and while that resolution remains in force I do not see that either the Court of Revision or the Judge of the County Court has any power to amend the roll by striking out the statute labour.

Let the writ issue as regards the statute labour.

*Prohibition granted.*

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## MCKINNON V. VAN EVERY.

*Contract with Indian—Interpretation of statute—Repealing Acts.*

A debt contracted by an Indian while Con. Stat. cap. 9 was in force, cannot now be sued for under 32-33 Vic. cap. 6.

*Quære*, whether a judgment can be obtained against an Indian even under the latter act.

[CHAMBERS, December 10, 1870.—GALT, J.]

This was a summons calling upon the plaintiff and the Judge of the County Court of the County of Haldimand to shew cause why a writ of prohibition should not issue to restrain any further proceedings on a plaint brought in the First Division Court of the County of Haldimand, to recover a debt contracted, while the Con. Stat. Can., cap. 9, was in force, by the defendant, who was admitted to be an Indian, within the provisions of that statute (now repealed), and of 32-33 Vic. ch. 6.

———— shewed cause, citing *Ellis v. Watt*, 8 C. B. 614  
*Zohrab v. Smith*, 5 D. & L. 635.

*Harrison*, Q.C., supported the summons, and cited 13-14 Vic. ch. 74, sec. 53; Con. Stat. Can., ch. 9; 31 Vic. ch. 42; 32 Vic. ch. 6; *Jacques v. Withy*, 1 H. Bl. 65; *Hitchcock v. Way*, 6 A. & E. 942; *Rex v. McKenzie*, R. & R. C. C. 429.

GALT, J.—It is admitted by the learned Judge in his very clear argument in this case, to which I am much indebted, not only for a statement of the facts, but for a reference to the authorities, that so long as Con. Stat. Can., cap. 9, was in force, this suit could not have been maintained, but he is of opinion that the repeal of that statute has the effect contended for by the plaintiff.

The 2nd section was: "No person shall take any confession of judgment or warrant of attorney from any Indian within Upper Canada, or by means thereof, or *otherwise* however obtain any judgment for any debt or pretended debt unless," &c., referring to circumstances which it is not pre-

tended exist in the present case. It is contended that, although when this debt was contracted there was no remedy for its recovery, yet that now a judgment may be obtained by reason of the repealing statute.

The learned Judge, in his argument, says: "As to the objections founded on the statute relative to Indians, the case of *Jacques v. Withy*, 1 H. Bl. 65, cited on behalf of the defendant, decides that a debt declared illegal by a repealed Act, and contracted during its operation, is not legalized by its repeal. *Hitchcock v. Way*, 6 A. & E. 943, also cited, decides that the law as it existed when the action was commenced must decide the right of the parties, unless the legislature express a clear opinion otherwise. If the debt contracted in this case had been prohibited by the statute then in force, it is probable that it would have been within the decision referred to, and that the present cause of action being founded on an illegal consideration might have been avoided on this ground; but by Con. Stat. Can., ch. 9, the remedy only was prohibited, and not the debt, and the prohibition being removed, as I think it has been for reasons hereinafter stated, the debt remains subject only to the provisions of the statute now in force: *Surtees v. Ellison*, 9 B. & C. 752."

With every respect for the opinion of the learned Judge, I am obliged to say that I differ from him in the construction to be put on the cases of *Hitchcock v. Way* and *Surtees v. Ellison*. The former was an action against the acceptor of a bill of exchange by a *bonâ fide* holder, brought to issue before the passing of Stat. 5-6 Wm. IV., ch. 41, but tried afterwards. It was held that the defendant might avail himself of statute 9 Anne, ch. 14, and was entitled to a nonsuit if he proved the bill to have been given for a gaming consideration. When the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature, by the language used, shew a clear intention to vary the mutual relation of such parties. The matter in dispute in that case, it will be observed, was whether an Act



of Parliament passed after a suit had been commenced would, without express words, deprive a defendant of a defence which he was entitled to urge but for the passing of the Act, and it was held it would not.

In the present instance the plaintiff insists, that although when this debt was contracted there was a positive prohibition against his obtaining a judgment against this defendant, the repeal of that enactment enables him to do so now, although there are no words used which would shew that such was the intention of the legislature. I must say that the above case appears to me to establish the contrary doctrine. It is true that Lord Denman, in giving judgment, refers to the commencement of the suit as determining the rights of the parties, but it must be borne in mind that this was said as regarded pleadings, not as regarded the right of action, and it would be singular if no remedy existed when the debt was contracted, and in fact where such remedy was actually prohibited, that the repeal of such prohibition should have an *ex post facto* operation, and enable the plaintiff to obtain a judgment for a debt contracted during the existence of the prohibition.

It is not necessary for the decision of this case to express an opinion as to what the rights of parties giving credit to Indians are under the present law, but I think it very doubtful whether even now a judgment can be obtained against an Indian.

The case of *Surtees v. Ellison*, *ubi sup.*, appears to me decisive against the plaintiff. It was an action brought by the assignees of a bankrupt against the sheriff of Durham. At the trial it appeared that before and in the year 1823 the bankrupt had carried on business as a seed merchant, and during that period had contracted a debt of £100 to the petitioning creditor, but he had not actually carried on business after that time. In 1826 the 6 Geo. IV., cap. 16, was passed, repealing the laws previously in force relating to bankrupts. In 1827 the bankrupt committed an act of bankruptcy by keeping house, and a few days afterwards the sheriff made the seizure complained of. For the

defendant it was contended that the commission could not be supported, inasmuch as there was no trading after Geo. IV., was passed. In giving judgment on the rule to enter a nonsuit, Lord Tentorden, C.J., says: "The rule for entering a nonsuit in this case must be made absolute. It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed." The other members of the Court concurred in this view.

Now, apply that case to the present. There had been no trading since the passing of the 6 Geo. IV. in the one case, nor after the passing of the 31 Vic. in the other; the transactions in both were passed and closed, and could not therefore be affected by any subsequent legislation, unless such an intention was plainly expressed. To give effect to the contention of the plaintiff in this case, I must be prepared to hold that although up to the date of cap. 6 of 32-33 Vic. (1869), no judgment could have been obtained against this defendant, yet that the passing of that statute shall leave not only the present defendant, but every Indian in this Province liable for debts contracted during a course of years during which the Legislature had most distinctly prohibited persons like the plaintiff from obtaining judgments against them. In my opinion the learned Judge had no authority to direct a judgment to be entered in this case, and the prohibition should issue.

*Prohibition granted.*

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## IN RE McDONALD ET AL. AND CATTANACH ET AL.

*Fence-viewers—Award—Right of Appeal—C.S.U.C., ch. 57, 32 Vic. ch. 46, O.*

The right of appeal to a County Court Judge against an award of fence-viewers, under 32 Vic., ch. 46, sec. 8, is not restricted to an award made under sec. 6, sub-sec. 2 of the Act, when the land benefited is in two municipalities, but extends to an award made by three fence-viewers under C. S. U. C., ch. 57, which the later Act amends and is made part of.

[CHAMBERS, 1870.—GWYNNE, J.]

ON the 20th December, 1869, John B. Snyder, John McDonald, and Farquhar McLeod, (who appended after their signatures the words, "water-course viewers,") made an award in relation to a certain water-course in the township of Lancaster.

They recited in the beginning of the award that on the 26th of October, 1869, they had been legally called upon to examine and determine a water course in dispute between Norman McDonald and Finlay Cattanach, and after being satisfied that all the parties interested were duly notified, they then proceeded to state what they did, and the conclusion they arrived at, and declared who should open or excavate the different sections of the water course. They proceeded to tax a bill of costs, the larger part consisting of their own fees, the whole amount being \$45.75, \$42.25 being the fees. They then apportioned the amount to be paid by the owner of each lot to be benefited by the drain or water-course to be constructed and improved.

On the 17th January, 1870, a notice was given on behalf of Norman McDonald and others interested in the matter of an appeal made against the award, and stating that the 3rd of February, 1870, at 10 o'clock, a. m., was the time and place fixed for hearing the appeal, and that the evidence of all the parties interested must be produced at the same time and place. The notice was entitled, "In the County Court of the United Counties of Stormont, Dundas and Glengarry."

A copy of the appointment of Geo. S. Jarvis, Esq., Judge of the County Court, to hear the appeal on Thursday, the 3rd of February, was put in.

On the 5th of February a summons was obtained in

Chambers, on the application of the respondents, calling on the appellants and the Judge of the County Court of the United Counties of Stormont, Dundas and Glengarry, to shew cause why a writ of prohibition should not issue to prohibit the said Judge from hearing the said appeal, or from further proceeding in the said appeal, and from making any order or direction therein, on the ground that the Judge had no jurisdiction to hear or proceed in the said appeal; and on the ground that the matters in question in the said appeal, and the water-course therein mentioned as affected, are situate in the township of Lancaster, and no appeal is allowed in case of lands wholly situate in one township; and that the said appeal is not within subsec. 2 of the seventh section of the Statute of Ontario, 32 Vic., ch. 46, and that there is no appeal in any other class of cases; and that the said appeal was not brought within thirty days after the award therein appealed from was filed with the Clerk of the Township of Lancaster; and why in the meantime proceedings on the appeal should not be stayed

*T. Moss* shewed cause.

*J. K. Kerr*, contra.

GWYNNE, J.—After much doubt and hesitation I have arrived at the conclusion that the appeal does lie in this case.

By the Con. Stat. U. C. ch. 57, it is provided, that when it is the joint interest of parties resident upon adjoining lands to open a ditch or water course for the purpose of letting off surplus water, &c., in order to enable the owners or occupiers of the lands to cultivate the same, such several parties shall open a just and fair proportion of such ditch or water course, according to their several interests, and that three fence viewers of the municipality, or a majority of them, shall decide all disputes between the owners or occupiers of adjoining lands in regard to their respective rights and liabilities under the Act; and also all disputes respecting the opening, making, or paying for ditches and water courses.



The award of the fence-viewers, when made, was required to be transmitted to the clerk of the municipality ; and was made binding on the parties. If any person failed to make the portion allotted to him, it was provided that any of the other parties interested might do so for him, after first completing his own proportion ; and in that case the party so doing the work might recover from the party failing, such sum as three fence-viewers of the municipality, nominated for that purpose by a justice of the peace, should award. The award so made was required to be transmitted to the justice, who was required to transmit it to the clerk of the municipality, and that award was made final ; so that when the award was one defining the work to be done by the several parties interested, or ascertaining the amount to be paid by the one failing to execute his part, in neither case was there any appeal. The Statute of Ontario, 32 Vic. ch. 46, extends the operation of that Act to the case of unoccupied and non-resident lands, and subjects the owners of them, where water-courses were required to be made, to the jurisdiction of the fence-viewers of the municipality in the same manner precisely as in the case of occupied lands, save only that unoccupied lands are not to be charged more than 25 cents per rod ; and it provides for notice to the non-resident proprietor. This Act also provides for the extension of water-courses from one Municipality into another, and it enacts that when any ditch or water-course is extended to the limit or boundary of a township, and, in order to be effective should be continued into or through another or adjoining municipality, *it shall be the duty of such municipality to extend and continue such ditch or water-course through such parts of its territorial limits as may be necessary for making such ditch or water-course effective.*

When the work is done, then the Act provides for an apportionment of the expense among the resident and non-resident proprietors as follows : " If the lands in both municipalities are benefited in an equal degree, in proportion to the extent of such work in each, then the duty of deciding in what proportion the expense shall be borne by and

amongst the owners of occupied and unoccupied lands in each municipality shall devolve upon and appertain to the fence-viewers in each such municipality" under the provision of Con. Stat. U. C. ch. 57 ; but if the water-course does not benefit the lands in both municipalities in an equal degree in proportion to the expense of the work in each, then the proportion of expense to be borne by the occupied and unoccupied lands shall be determined by the award of *six* fence-viewers appointed by a justice of the peace, three from each municipality, and the award of such six, or a majority of them, shall be executed in duplicate, and one shall be transmitted to the clerk of each municipality and shall be binding on the parties.

If it were not therefore for the seventh section of the amending Act, all awards, whether made by *three* fence-viewers or a majority of them, and whether made for the purpose of defining the work to be done, or of compelling payment by a party failing to perform the work which he was directed by a fair award to execute, or by six fence-viewers or a majority of them (in the particular case referred to in subsec. 2 of sec. 6, of 32 Vic. ch. 46,) were all equally final and without appeal. If it was the intention of the Legislature to confine the right of appeal given by the 7th sec. to the particular case of an award made by the six fence-viewers and a majority of them, as contended by Mr. Kerr, it would have been more natural that the right of appeal should have been inserted as a proviso (qualifying the binding quality of such award) to the 2nd subsec. of sec. 6.

Finding all awards, under whichever Act authorized, *equally* binding and conclusive, and finding the power of appeal for the first time given in a separate and distinct section of the Act, and being directed to read both Acts as one, I think the 7th section of 32 Vic. ch 46, which contains the right of appeal, must be read as applying to all the preceding parts of the two Acts, reading them as one, instead of as applying only to a *portion* of the 2nd subsection of section 6 of the 32 Vic. The latter part of that subsection had just declared that the award of the majority of the six fence-viewers "*shall be binding,*" using the same

language to indicate finality as is used in sec. 9 of ch. 57, "and shall be transmitted by the justice to the clerk of the municipality." Now there is no provision for the justice having it to transmit, except subsec. 9 of sec. 16 of ch. 57, which declares that the award shall be final; so that *all* the awards were made equally final until the 7th sec. of 32 Vic. was introduced. I think it therefore most consistent to hold that this section was introduced for the purpose of giving an appeal generally, and that the section must be construed as pervading the whole amalgamated Act, and as introducing the right of appeal in all cases.

The 7th section will then read, "notwithstanding any thing in the Act contained it shall be competent for any party affected by *any* decision of such fence-viewers,—namely the fence-viewers aforesaid in these Acts mentioned (reading the two as one), and not merely such six only as are mentioned in the latter part of the preceding section—to appeal against such decision to the Judge of the County Court of the County within which the land of the party appealing is situate, within thirty days after the decision appealed against shall be filed with the clerk of the municipality.

*Summons discharged.\**

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### THE QUEEN V. PATTEE.

*Sci. fa. to repeal a patent—Fiat of Attorney General—Who to grant.*

A *sci. fa.*, to set aside a patent, was issued at the instance of a private relator without the fiat of either the Attorney General of the Dominion or of Ontario having been first obtained.

*Held*, 1. That a fiat was necessary.

2. That the Attorney General of Ontario was the proper authority to grant the fiat in such a case.

[CHAMBERS, January 5, 1871.—MR. DALTON.]

A writ of *sci. fa.* was issued at the instance of John Lough, to set aside a patent, granted on the 12th August,

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\*This decision was moved against in the Queen's Bench, but was upheld, and the rule *nisi* discharged with costs.—REP.

1870, to Gordon Burleigh Pattee, on the ground that the patent was contrary to law, in that Pattee was not the first and true inventor of the invention, for reasons which it is unnecessary to state at length.

Certain proceedings were taken on this writ, the regularity of which was questioned; and finally the defendant obtained a summons calling on John Lough, the relator in this case, and the Attorney-General for Canada, to shew cause why the writ of *sci. fa.* and the service thereof, and declaration and rule to plead, should not be set aside on the ground, amongst others, that no fiat of the Attorney-General for Canada, or of the Attorney-General for Ontario, was filed before the issue of said writ, or at any time since, and that said writ issued without authority and that all subsequent proceedings in this cause have been had without proper authority therefor; or why all further proceedings in this cause should not be stayed until a fiat or warrant of the Attorney-General shall have been filed authorizing the proceedings in this cause.

*R. A. Harrison*, Q. C., for the relator, John Lough, showed cause.

*S. Richards*, Q. C., for the defendant, supported the summons.

*C. Robinson*, Q. C., appeared for the Attorney-General of the Dominion.

MR. DALTON.—In the opinion which I have come to, it is not necessary to detail minutely the proceedings. I will assume that there has been an appearance in the suit, or what justified the plaintiff in supposing that there was an appearance. As soon as conveniently could be, after discovering that no fiat of the Attorney-General had been obtained, and without any further step in the defence, the defendant has moved to set aside the *scire facias*. I think that, for such a cause, which goes to the authority for the whole proceeding, he has a right to move at almost any stage, upon first discovering the defect of



authority ; and I do not imagine that anything would take away that right but the acquiescence of the defendant himself, either express or implied, which must of course be after he had become aware of the want of authority.

There are two important questions : first, is a fiat necessary ? and, secondly, if so, by what authority should it be granted ?

Before the statute of Canada, 1869, ch. 11, the books and the actual practice shew that a fiat was necessary. By the Consolidated Act of Canada, ch. 34, the proceedings to be had upon the writ of *scire facias* were directed to be according to the law and practice of the Court of Queen's Bench in England ; and Con. Stat. U. C. ch. 21, sec. 14, also makes the fiat necessary. By the English practice, not only is it necessary to the institution of proceedings, but the Attorney-General has the control of the case throughout, and may at any time enter a *nolle prosequi*: Hindmarch, 396.

But Mr. Harrison contends that section 29 of the Act of 1869 supersedes the former statutes and practice, and is now in itself the complete enactment we must look to, as to this remedy by *scire facias* ; and it was with this belief that he issued the present writ without a fiat. That section enacts that any person desiring to impeach a patent may obtain a sealed and certified copy of the patent, and of the petition, &c., and may have the same filed in the particular court according to his domicile, which court shall adjudicate on the matter, and decide as to costs : that the patent, &c., shall then be held as of record in such court, so that a writ of *scire facias* under the seal of the court, grounded upon such record, may issue for the repeal of the patent for legal cause, if, upon proceedings had upon the writ, the patent shall be adjudged void.

Now Mr. Harrison contends that this clause supersedes the old law, and gives the absolute right to any person desiring to impeach a patent to issue and proceed upon a *scire facias* without the leave of any one ; and he instances

several known proceedings where the name of the Queen is used by a private prosecutor as of course.

Mr. Richards, on the other hand, contends that the short terms in which the *scire facias* is mentioned, are used with reference to the known practice as to such a writ, existing at the time when the Act was passed, and that the process is therefore subject to all the old established conditions.

By the use of the name of the Queen, the prosecutor is placed in this position of advantage: he cannot be subjected to a *non-pros.*: he cannot be non-suited: the defendant cannot demur to evidence: it is doubtful whether a bill of exceptions will lie to the charge of the judge: if the defendant obtains judgment, he is not entitled to costs; and, what strikes me as more important still, the prosecutor can go into the box, and establish his own case as a witness, but the defendant in a Crown case cannot be examined in his own behalf. When it is considered that this proceeding is very often taken by a person who himself claims the right to the invention in the patent he is attacking, it certainly seems a peculiar state of things that one of the rival claimants can be a witness and the other cannot.

The fiat is not a mere form, then, but a matter of substance; and it is very necessary that some authority should exist to control the exercise of the power which it confers, and to guard against its abuse.

Now, the 29th section of the Act of 1869 does *not* it seems to me, give the person desiring to impeach a patent the *right* to issue a *scire facias*; it certainly does not do so in terms. It gives him the right to record the patent, "so that a writ of *scire facias* may issue for the repeal of the patent." But on whose authority is it to issue? As the clause does not expressly say that *he* may do it, and it is not only formally but substantially a suit of the Queen, it seems to follow, even without regard to the previous known practice, that it can only be on the authority of the Attorney-General that the writ is to issue. So that I agree with Mr. Richards.

Consistent with this is the repealing clause of the

act of 1869. It repeals ch. 34 only in so far "as it may be inconsistent with this Act." Now, the provision of sec. 20 of ch. 34, that the proceedings upon the *scire facias* shall be "according to the practice of the Court of Queen's Bench in England," is not inconsistent with the Act of 1869, but in furtherance of it. Therefore, whether Mr. Harrison is right or not in contending that ch. 21, Con. Stat. U. C. is inapplicable to a patent issued under the Act of 1869 because it is not issued under the great seal, I think a fiat was necessary for this writ of *scire facias*.

But whose fiat?

It may provoke a smile that an officer of the court, in deciding a matter of practice, should incidentally consider a question under our constitution, which is of some importance in itself, and is a part of larger questions. It is of little matter, however, where it may begin; it must come to the decision of the court. I was told, when I suggested the question on the argument, that it was very doubtful whether the Minister of Justice or the Attorney-General for Ontario be the proper authority to grant a fiat in such a case. I must therefore suppose it is doubtful, though I myself cannot see the grounds for doubt. I cannot think that *two* authorities exist, *either* of whom may grant it. Some one authority, and one *only*, must answer here the position of the Attorney-General in England in respect of this matter.

The British North America Act, section 92, enacts that "In each Province the Legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated, that is to say (after twelve other heads): 13, Property and civil rights in the Province; 14, The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

These sections express the powers of the Legislature of Ontario.

Then as to the Executive, section 135 enacts, "that until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities, at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any law, statute, or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant Governor for the discharge of the same or any of them." So that, as is consistent and natural, the executive and legislative functions of the Government of Ontario seem to be co-extensive.

The words of this statute have been well weighed. But what definition of "property and civil rights" can exclude the right of enforcing a civil remedy in the courts? To lawyers, that seems the practical proof and test of all right: without it, at any rate, no other right is of any real value. And further, there is attributed to the local jurisdiction "the administration of justice in the Province, \* \* \* including proceedure in civil matters." Then if the legislative and executive powers as to "property and civil rights, in this Province," and "the administration of justice," and as to "civil proceedings in the Courts," are in the Government of Ontario, can it be thought that any other authority is for the present purpose indicated, than that of an officer of Ontario responsible to its Legislature? For, let it be borne in mind, that he who has the discretion to grant, has also the discretion to withhold, and that it is only by *scire facias* that a subject in Ontario, aggrieved by a patent wrongly issued, can seek the remedy of its avoidance.

I desire not to amplify; but other reasons in and out of the Act, point to the conclusion that the Attorney General of Ontario is the authority that must grant or refuse the fiat which is necessary to the real plaintiff here to pursue this remedy. I shall not be understood as speaking of the



case where the Crown itself seeks to avoid a patent; I speak only of the present case, where a subject domiciled in Ontario seeks to avail himself of the peculiar privileges of the Crown to assert its own private interests.

I think the proper order is, that upon payment of the costs of this application, and filing a fiat of the Attorney General of Ontario—which may be done *nunc pro tunc*—this summons be discharged. Upon failure to do this within two calendar months, that the writ and all proceedings be set aside with costs, to be paid by the relator.

*Order accordingly.*

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#### COUNTY OF FRONTENAC V. CITY OF KINGSTON.

*Judgment Roll—Form of—Where issues of law and fact, and declaration held bad.*

Where defendant obtains judgment in demurrer because of the insufficiency of plaintiff's declaration, although there are also issues in fact and demurrers to pleas, the judgment roll should contain only the declaration, demurrer, and judgment, omitting all intermediate proceedings.

[PRACTICE COURT, Mich. Term, 1870 :—Hil. Term, 1871.—MORRISON, J.]

During Michaelmas Term, 1870, *Harrison*, Q. C., obtained a rule to set aside the judgment and judgment roll in this cause, on the ground that the roll was not a transcript of the pleadings, omitting the first, third, fifth, and sixth pleas of the defendants and the issues in fact joined thereon : that those issues were never tried, and were still subsisting, nor were they struck out or disposed of, or in and by the judgment decided or determined ; and that until the same were decided, defendants had no right to enter judgment on the said pleas ; and also that as judgment was given against the plaintiffs on demurrer for insufficiency of their declaration, no judgment was given in favor of defendants on the demurrers to their pleas, the rule for judgment in no manner authorizing judgment to be entered for defendants for suffi-

ciency of their pleas; and that judgment for defendants should have been entered simply for insufficiency of declaration.

During the same Term, *D. B. Read*, Q. C., obtained a cross-rule to amend the judgment-roll by inserting therein a full transcript of the pleadings, and a suggestion that the plaintiffs' declaration being held insufficient in law, it became unnecessary to try any of the issues in fact, and that the same ought not to be tried, and that defendant do go thereof without day, &c., or to that effect, or why the issues of fact in the record should not be expunged.

Both rules were argued at the same time.

*Harrison*, Q. C., for plaintiff.

*Read*, Q. C., for defendant.

MORRISON, J.—It appears from the affidavits and papers filed, that the defendants demurred to the plaintiffs' declaration, and also pleaded several pleas. The plaintiffs took issue on all the pleas, and also demurred to the second, fourth, and seventh pleas. Judgment was given for the defendants on the demurrer to the declaration, and a rule for judgment for defendants on demurrer was taken out and judgment entered. The judgment-roll only contained the declaration, demurrers thereto and joinder, the pleas demurred to (omitting the first, third, fifth, and sixth pleas,) the replication, taking issue on all the pleas, and the demurrers to the second, fourth, and seventh pleas, and the joinder in demurrer. The roll ended thus: "It appears to the Court here, that the said declaration is, and the several counts therein, are bad in substance;" and these words were interlined, "and also that the second, fourth, and seventh pleas are good in substance. Therefore it is considered that the plaintiffs take nothing, &c.;" and then follows award of costs of defence.

Now, it is clear that the judgment-roll should be a transcript of all the pleadings; and although the books of practice and forms do not give any practical directions as to the

way of making up the roll and entering judgment in a case like this, when the Court have determined that the plaintiff's declaration shews no cause of action, at the same time expressing their opinion that if the plaintiff had shewn a cause of action, certain of defendants' pleas demurred to were good pleas. Yet it appears to me that, as the rule and practice is, that the judgment shall be against the party who makes the first default, that where the plaintiff fails, as here, in his declaration, and judgment is against him, the same being final, no matter what may be the state of the subsequent pleadings, the final entry on the roll should be judgment for the defendant, on account of the declaration being bad in substance, taking no notice of the subsequent pleadings demurred to.

Then as to the issues in fact, as they appear on the roll, it seems to me that the mode of entry adopted in the case of *Robins v. Crutchley*, 2 Wils. 118, is the proper and most convenient way of disposing of them. In that case the roll, after stating that plaintiff's replication was insufficient, proceeds : " Therefore, no respect being had to the issues aforesaid above joined between the parties to be tried by the country, it is considered that the plaintiff take nothing by her said writ, &c." I therefore think that the entry on the roll, as the second, fourth, and seventh pleas of the defendants being good in substance, ought not to have been so stated, as the defendants had final judgment on account of the plaintiffs' declaration being bad in substance, and that it should be struck out. This, I understand, was the main ground of complaint on the part of Mr. Harrison. If the defendants desire it, their rule to amend the roll shall be absolute, the defendants paying to the plaintiffs 25s. costs ; such amendment to be made within two weeks. If the amendment be not made within that time, the plaintiffs' rule to be made absolute for setting aside the judgment with costs.

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## GRANT V. PALMER ET AL.

*Record—What it should contain—C. L. P. Act, sec. 77.*

Issues in law having arisen on the same pleadings with issues in fact, the former, which had been already argued but not determined, were omitted from the *nisi prius* record.

*Held*, an irregularity in omitting these issues, on which contingent damages might have been assessed ; and plaintiff was ordered, after verdict, to amend the record by inserting them.

The question, how far the *nisi prius* record should be a full transcript of the pleadings, discussed.

[PRACTICE COURT, Hilary Term, 1871.—WILSON, J.]

This was an action brought on a promissory note made by the defendant Winstanley, and endorsed by the defendant Palmer. The latter pleaded three pleas, on all of which the plaintiff joined issue, and demurred to the first and third. The defendant Winstanley, pleaded one plea, on which the plaintiff joined issue.

During this Term a rule was obtained calling on the plaintiff to shew cause why the record or paper writing purporting to be a record of *nisi prius* in this cause and the verdict rendered in favor of the plaintiff herein should not be set aside, either wholly or as against the defendant Palmer for irregularity, with costs, on the grounds that such record or paper writing, purporting to be a record of *nisi prius*, is irregular and defective as such, in that it is not a complete transcript or copy of all the pleadings in this cause, but wholly omits therefrom the demurrer of the plaintiff to the first and third pleas of the defendant Palmer herein, and the joinder in demurrer thereto ; and also that such record contains no entry of any intended assessment of damages, contingent or otherwise, with reference to such demurrer, or why the verdict should not be set aside on the merits, and on other grounds disclosed in the affidavits and papers filed.

*Harrison*, Q. C., shewed cause :

The question of irregularity only can be raised in this Court.



The demurrers were argued before the trial, and stood for judgment, and judgment has been given on them since the trial.

The jury had nothing to do with the issues in law, because the demurrers were to pleas on which issues in fact were also joined, and all the issues in fact were on the record: *Harrington v. Fall*, 15 C. P. 541; *Campbell v. Kemp* 16 C. P. 244.

The record should be a copy of the issue-book: *Doe v. Cotterell*, 1 Chit. Rep. 277; *Shepley v. Marsh*, 2 Str. 1131; and must be passed by the proper officer: *Reeves v. Eppes*, 16 C. P. 139. The issue-book must also be made up: *Jones v. Tatham*, 8 Taunt. 634.

He referred also to *Skelsey v. Manning*, 8 U. C. L. J. 166; *Patterson v. McCallum*, 2 U. C. L. J. N. S. 70; *Wood v. Peyton*, 2 D. & L. 441; Har. C. L. P. Act, (2nd Ed), 643, note (x), 287, note (v); *Welsh et al. v. O'Brien et al.*, 29 U. C. R. 474.

*M. C. Cameron*, Q. C., supported the rule :

The question is, are the demurrers a necessary part of the record? If they are, they should have been on the record.

The Common Law Procedure Act, section 77, enacts that every declaration or other pleading shall be entered on the record made up for trial.

Section 203 provides for passing the record by the Clerk of the Crown or his deputy, and that it shall be signed by him.

The issue-book is required to be made up only by rule of Court.

The judgment-roll is made up from the *nisi prius* record. The latter, therefore, should contain a full transcript of the pleadings. The practice is clear on that point: Arch. Pr. 12th Ed., 929; Impey's Pr. K. B., 6th Ed. 368; *Ferguson v. Mahon*, 2 Jur. 820.

WILSON, J.—In 2 Lush's Pr. 537-538, it is said if the record be right proceedings will not be set aside because the issue-book is wrong: Bagley's New Pr. 165; Tidd's New Pr. 476; *Codrington v. Lloyd*, 8 A. & E. 449.

The defendant, it is admitted, is estopped from complaining of the defective issue-book, but still the record has to be made up, passed and signed by the officer of the Court.

The officer knows nothing of the issue-book: he must make up or pass the record from and by the original pleadings on his file, which he has not done. The issue-book is only a collateral proceeding.

The case in 15 C. P. 541, applies only to actions of ejectment, which are regulated by a practice under the special statute applicable to them.

It is said that a plea in abatement, on which judgment of *respondeat ouster* is given, is not entered on the roll: *Pepper v. Whalley*, 4 A. & E. 90; *Dubartine v. Chancellor*, 1 Ld. Ray. 329.

In 1 Sellon's Pr. 425-429, it is said that all the pleadings in the cause must be regularly entered *verbatim* on the *nisi prius* record, and if there are proceedings on demurrer they must be set forth.

By Tidd's Pr. 9th ed. 775, the *nisi prius* record contains an entry of the pleadings, &c., as in the issue or paper-book; and (p. 722) the issue-book must contain all the issues in fact and in law.

By the present English practice it is a copy of the issue as delivered in the action, which must contain the whole of the proceedings.

By section 203 of the Common Law Procedure Act, the *nisi prius* record is to be passed and signed by the officer of the Court in whose office the same is passed. The *nisi prius* record is referred to as a well known proceeding, and it is not said what it shall contain.

In *Pepper v. Whalley*, 4 A. & E. 90, the Court refused to set aside a verdict because the *nisi prius* record did not contain an entry of the plea in abatement on which a judgment of *respondeat ouster* had been given, because such proceedings were by the subsequent pleadings rendered wholly immaterial.

In *Wadsworth v. Brown*, 3 Dowl. 698, the Court made

absolute a rule for a repleader, or for the plaintiff to amend, setting aside the verdict, when the plaintiff to a plea concluding with a verification, had not taken issue, but had only added a similiter.

In *Codrington v. Lloyd*, 8 A. & E. 449, there were issues of law and in fact. The plaintiff had got judgment on the issues in law. He then delivered the issues and notice of trial. The award of jury process in the issue was that the jury were to try the issues in fact, and not to assess the damages on the demurrer. It was contended that as the issues in fact went to the whole cause of action, the jury would of course assess damages on the whole cause of action, and so a direction to them to assess the damages on the demurrer was unnecessary. Lord Denman, C. J., apparently assented to that argument, if there had been no judgment on the demurrer, and if the damages had to be assessed contingently, for he says (p. 456), "This argument is quite just in the event of the jury finding for the plaintiff; but if they should find for the defendant it is still possible that the plea may be held bad, and that the Court may give judgment for the plaintiff notwithstanding the verdict; if they should do so, and also give judgment for the plaintiff on the demurrer, he will be entitled to damages, and a second jury must be summoned to assess them. \* \* \*

And as there is a possible state of circumstances which may lead to the necessity of summoning a second jury, if that form be not adopted (*i. e.* to award a *venire tam quam*), this issue is incorrect in not adopting it."

In the case referred to there could have been no assessment of contingent damages, even if judgment had not been given on demurrer, if the plaintiff failed on the issues in fact.

That case is then authority that a general *venire* to try the issues in fact will be sufficient, although there are issues in law on the record, if judgment has not been given on them, and if the issues in fact go to the whole cause of action. It is very strongly an authority by implication also, that the issues in law must be actually entered on the record, so that

damages may be assessed on them, contingently or otherwise, according to the fact. In *Ferguson v. Mahon*, 2 Jur. 820, a notice of trial was set aside because the issue-book had been made up and served, omitting the issue in law. The Court will not, when damages have not been assessed at the trial, award a writ of enquiry—it must be a *venire de novo*: *Clements v. Lewis*, 3 B. & B. 297.

It is the duty of the attorney in the cause to make up the record, and it is quite clear that the issues in law as well as in fact should have been entered, and that the officer of the Court should not have passed and signed the record in its present form.

In this case the cause of action is founded on a promissory note made by Palmer, payable to his co-defendant Winstanley. Winstanley pleaded payment. Palmer pleaded three special pleas on which the plaintiff joined issue, and the plaintiff demurred to the first and the third pleas of Palmer. The plaintiff succeeded on all the issues in fact, so that the issues in law are of no moment, excepting as to costs, and since the trial the Court has given judgment for Palmer on the demurrer to his first plea, and for plaintiff on his demurrer to Palmer's third pleas.

If judgment had been given before the trial for the plaintiff on the demurrer, he should have entered it to have an assessment of damages, for, as in *Codrington v. Lloyd*, 8 A. & E. 449, the plaintiff might have failed in the issues in fact, and then he would be obliged of necessity to assess his damages on the issues in law. That would have been an argument against allowing the cause to go to trial, under such circumstances as in the case just referred to. But is it any argument after the trial has taken place, and the plaintiff has succeeded on the issues in fact, and assessed thereon all the damages he can ever get? I am not satisfied that it is. As judgment was not given on the issue in law at the trial, the case stood thus. If the plaintiff succeeded on the issues in fact, he would get his damages assessed thereon, and as much as he could ever get even if



his issues in law had been there as well. But the defendant might have succeeded on all three of his issues in fact, and the plaintiff on the issues of fact joined with Winstanley; in any of which cases the plaintiff should have been in a position to have assessed his contingent damages, so that if he got judgment afterwards on the demurrer, there would have been no necessity for any new assessment of damages to be made. It so happens that the result of the trial has not made a *venire de novo* necessary. But, as a matter of practice, is it expedient that causes should be so dealt with that they should be taken down to trial in this imperfect and improper manner? I do not think it is.

If this were an application before trial to set aside the notice of trial and the service of the issue book, I should certainly, on the express authorities before referred to in 8 A. & E. 449, and 2 Jur. 820, be obliged to do so, for the mischief apprehended might happen. Here, however, the trial is over, and no mischief has happened. No new assessment of damages is required.

I am desirous to sustain the proceedings if I can; yet I am afraid of introducing a confusion and laxity of practice that may be very embarrassing.

The amendment, too, might have been made at the trial. Nothing has been said of waiver by not being objected to at the trial. Perhaps it might have been useless, as the cause was tried in the County Court. I think it can only be properly cured by amending the record now, if it is an amendment which I ought to make. It is true, as Williams, J., said, in *Ferguson v. Mahon*, 2 Jur. 820, "Throwing a demurrer at the jury does not appear to be of much use, however ancient the practice may be." But there is nevertheless an order, regularity, and certainty, that must be observed, for the very purpose of facilitating and expediting business.

On the whole, though with some doubt and hesitation, I think I should now amend this record by making it, as it should have been, as the same assessment that was made will enure to the benefit of the plaintiff on the issues of law that have since been disposed of in his favor.

This defective record, which was and must have been passed and signed by the deputy Clerk of the Crown, may be considered to have been the act of the officer of the Court, just as the writ in *Reg. v. Conyers*, 8 Q. B. 981 was deemed to have been drawn by the officer of the Court, and the defect to have been by his misfeasance, though he only sealed it, and it was drawn and settled in fact by a special pleader, whose mistake it really was. The plaintiff must, however, pay the costs of this application.

The rule will therefore be discharged on condition of the plaintiff amending the *nisi prius* record *nunc pro tunc* within two weeks, and upon paying to the defendant, Palmer, the costs of this application, or upon amending within two weeks after Palmer shall have filed his co-defendant's consent to the amendment being made; and, if Palmer shall not so file such consent within two weeks from this time, this rule will be discharged without costs, as Winstanley should properly have been called on by the rule to shew cause as well as the plaintiff.

*Rule discharged.*

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#### WEAVER V. BURGESS ET AL.

##### *Ejectment—Striking out defendant—Terms.*

The name of a defendant, who disclaimed all interest in the land, except as dowress, struck out of the proceedings in ejectment.

[CHAMBERS, February 1, 1871.—MR. DALTON.]

A summons was obtained on behalf of Ann McWade, one of the defendants in an action of ejectment, calling on the plaintiff to shew cause why her name should not be struck out of the writ and proceedings in this cause, on the ground that she had no interest in the land in question except a right to dower, which had not been assigned to her.

*O'Brien* shewed cause :

This summons must be discharged. This defendant is in

possession, and the writ must therefore be directed to her. There is authority to strike out the name of a defendant who is a tenant, but not that of a dowress. *Kerr v. Waldie*, 4 Prac. Rep. 138, is founded on two cases which, it is submitted, do not warrant the conclusion arrived at, and the leaning of the learned Judge there is against the practice. The principal reason given is, that a defendant who claims no interest becomes liable for costs; but here the applicant is a dowress, and claims a certain interest. If no judgment is obtained against her the plaintiff can not get possession. See *Peebles v. Lottridge*, 19 U. C. R. 628; *Jones v. Seaton*, 26 U. C. R. 166; *D'Arcy v. White*, 24 U. C. R. 570; *Hall v. Yuill*, 2 Prac. Rep. 245; *Kerr v. Waldie*, 4 Prac. Rep. 138; 3 U. C. L. J. N. S. 292.

*John Patterson*, contra, relied on *Kerr v. Waldie*, ante.

MR. DALTON.—I shall follow *Kerr v. Waldie*. I can see no difference in the position of a dowress and a tenant. But I can only make the order upon this defendant undertaking to be bound by the final judgment in the case, so far as possession is concerned, as though her name had not been struck out, and the order as to costs will be the same as in *Kerr v. Waldie*.

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## REGINA EX REL. FORD V. McRAE.

*Treasurer—Annual appointment—Election—Contract with Corporation—Notice to electors of disqualification.*

The treasurer of a township was appointed by annual by-laws, which were silent as to time, in 1859, 1860, and 1861. In 1861 the defendant became his surety by bond, which, however, did not state the duration of the liability. In 1863 the same treasurer was also appointed by a similar by-law. In 1864 the by-law limited his liability to the year 1864. From thence to 1868 no time was specified, but was in that year. In 1869 the treasurer's accounts were audited and found correct. *Held*, that this bond was only a continuing security until the expiration of the treasurer's term of office, and that the liability ceased on his re-appointment in 1863, and that therefore the defendant had not a contract with the corporation so as to disqualify him as a councillor.

To entitle a candidate to the seat claimed by him on the ground of his opponent's disqualification, it must be shewn that the qualification was objected to at the *nomination*, so that the electors might have an opportunity of nominating another candidate.

[CHAMBERS, February, 1870.—MORRISON, J.]

This was a writ of summons in the nature of a *quo warranto*, calling upon Farquhar McRae to shew by what authority he exercised or enjoyed the office of Reeve of the village of Colborne, and why Charles Raymond Ford should not be declared duly elected to the office of Reeve and be admitted thereto.

The statement and relation of Ford complained that he (Ford) was duly elected Reeve, and ought to have been returned, &c., &c. He stated the following cause why the election of the defendant to the office should be declared invalid, and he (Ford) duly elected thereto—that the defendant was disqualified by reason of his having at the time of such election, an interest in a contract with the Corporation of the Village of Colborne, in that he was bound in a bond to the said corporation in \$2,000, for the faithful performance by one Merriman of the duties of Treasurer of the Municipality, of which the electors had notice. That before the opening of the poll on the 3rd of January last, he (Ford) notified the Returning Officer and the electors then present, that he claim-



ed to be duly elected Reeve for the present year, and protested against any poll being opened or votes taken by the Returning Officer for the candidates, and delivered to him and to the defendant printed copies of the following notice:—

“Take notice that I claim to be duly elected Reeve of the Village of Colborne for the year 1870, on the ground that I am the only person duly qualified, who was nominated and seconded for that office, at the nomination of Reeve and councillors for the Village of Colborne, for the year 1870. Mr. F. McRae, the only other person nominated for Reeve, being disqualified on the ground that he is surety for J. M. Merriman, Treasurer of this Municipality. I hereby protest against any votes being received by the Returning Officer for any candidate for Reeve, and notify the electors that any votes given by them for candidates for Reeve, will be thrown away.

(Signed) “C. R. FORD.”

The relation further stated that printed copies of such notice were posted up in conspicuous places, prior to the opening of the poll.

*R. A. Harrison*, Q.C., supported the summons, and contended that it did not matter whether there was any liability on the bond, but the question was whether there was a contract with the corporation, and it was admitted that there was, and no discharge was shewn. The bond, too, was conditioned to the effect that the Treasurer should at all times, during which he held his office, do certain acts enumerated. The office is not an annual office. The re-appointment of the Treasurer from year to year was an unnecessary act. He cited sections 161 and 177 of the Act of 1866; *In re McPherson and Beeman*, 17 U. C. R. 99; *Reg. ex rel. Bland v. Figg*, 6 U. C. L. J. 44; *Reg. ex rel. Rollo v. Beard*, 1 U. C. L. J. N. S. 126. The notice, being given before the day of voting, was sufficient to entitle the relator to the seat if the defendant should be disqualified; for if the electors had the notice, they threw away their votes, which was all that was required.

*Armour*, Q.C., shewed cause, and contended that the appointment of Treasurer was an annual one, and the bond was of no effect after the year was up: *Peppin v. Cooper*, 2 B. & Al. 431; *Liverpool Water Works Co. v. Atkinson*, 6 East, 507; *Angero v. Keen*, 1 M. & W. 390; *Bamford v. Iles*, 3 Exch. 380; *Mayor of Berwick v. Oswald*, 1 E. & B. 295, 3 E. & B. 653, 5 H. L. Cases, 856; *Pybus v. Gibb*, 6 E. & B. 902; *Reg. v. Hall*, 1 U. C. C. P. 406; *Reg. ex rel. Hill v. Betts*, 4 Prac. Rep. 113. He also contended that the objection to the election was taken too late; it should have been taken at the nomination, and the notice was given just before the election: *Reg. ex rel. Tinning v. Edgar*, 4 Prac. Rep. 36; *Reg. ex rel. Adamson v. Boyd*, 4 Prac. Rep. 204; *Reg. v. Mayor of Tewksbury*, L. R. 3 Q. B. 629.

Affidavits were filed on both sides. The material facts are referred to in the judgment of

MORRISON, J.—In this case there are no disputed facts. It appears that on the 20th of December last, at the nomination of Reeve for the village of Colborne, for the present year, the relator and defendant were duly nominated as candidates for the office—no objection at such nomination being made to the qualification of the defendant. A poll being demanded, the polling was fixed under the statute for the first Monday in January; on that day the relator publicly notified the electors, as stated in the notice set out in his statement, that he claimed to be elected Reeve on the ground that the only other person nominated being the defendant, he, the defendant, was disqualified, on the ground that he was surety for the Treasurer of the municipality, and he notified the electors that any votes given by them for Reeve, would be thrown away. The election nevertheless proceeded, and the defendant was declared elected—having a majority of votes.

On the 12th of January this application was made.

It appears from the affidavits filed that Mr. Merriman, for

whom it is alleged the defendant was a surety, was first appointed Treasurer by a by-law for the year 1859, again by by-laws for the years 1860 and 1861, respectively. In the latter year the defendant became one of his sureties. The bond contains no recital, but the condition is—"That if Merriman do and shall from time to time and at all times during his said office as Treasurer of the said Municipality, to which he has been appointed, well and truly account for all moneys which he may from time to time receive, &c., and pay over and deliver any sum or sums ordered to be paid by the said Municipal Council, their successors or assigns, and in all things duly execute and perform the duties of his said office, and if upon his discharge or at the expiration of his term of office, he shall render up quiet and peaceable possession of the books and accounts belonging to his said office as Treasurer, &c., unto the said Municipality, their successors or assigns, then the obligation to be utterly void, &c."

Now it appears that this Council annually appointed by by-law their Treasurer: that Mr. Merriman, as already stated, was so appointed in the years 1859, 1860, and 1861, and in the latter year the defendant became his surety. Mr. Merriman was afterwards re-appointed Treasurer by by-law in 1863, and also in 1864: in the previous years his appointment was, as to time, silent: in 1864 the by-law specifically limits his appointment to the year 1864; in the following years he was re-appointed without specifying the period, until 1868, when his term of office was again limited to that year. At the end of all these years, including 1869, the Treasurer's accounts were duly audited and found correct. Attached to the Treasurer's affidavit is the bond in question, and it further appears by an indorsement on it, that by a resolution of the Council it has been cancelled. This was done since this application was made, and could have no effect on my decision, but I only note the fact as shewing that the Municipality consider they have no claim under it. I also may remark, that in the year 1853 this defendant was elected a member of the council.

Looking at the conditions of the bond, from which I must gather the contract between the parties, it refers to Merri- man's then appointment as Treasurer, and the limit of the sureties in point of time is that of his discharge or the expiration of his term of office. Now, considering that this office of Treasurer was by the uniform rule and action of the Municipality an annual one, and under the authority of an annual by-law, and the condition of the defendant's bond contemplated an expiration of the Treasurer's term of office, it is, I think, only reasonable to assume, that the Municipality and the Treasurer acted upon the assumption that the term of office expired at the end of each municipal year, and that the sureties joined in the bond knowing such to be the case, and only for the year, as sworn to by the defendant. It is true, as argued by Mr. Harrison, if the Treasurer had not been re-appointed, that under the 117th section of the Municipal Act he would hold office until removed by the Council. But the fact of his re-appointment in 1863 implied, at all events, that his term of office expired at the end of 1862; and his re-appointment by by-law in 1864, expressly limited his appointment to that year. At the end of that year his term of office certainly expired, and as he made no default, but faithfully performed his duty, &c., as Treasurer, up to that period, his sureties under the bond in question were discharged from all liability—if they had not been discharged at the end of 1861 or 1862. There are no words in the condition indicating that the sureties engaged to be liable upon his re-appointment from time to time. The Council might have taken a bond continuing the liability of the sureties upon fresh re-appointments, but such an intention should expressly appear in the bond. What was said in giving judgment in the case of *Mayor of Cambridge v. Dennis*, E. B. & E. 659, which was the case of a Treasurer's bond, has a strong bearing on this case. There the learned Judges were of opinion that the sureties did in fact look beyond the current year, but they were constrained to give judgment for the sureties. Coleridge, J., said, "I incline,



from what generally passes on these occasions, to believe that the parties did not think much about the point; but, knowing that the office was annual, gave their security for it as they found it. However, supposing that not to be so, we are clearly not at liberty to resort to such considerations in construing this instrument; we must take its words and apply the law to them. It is admitted that *prima facie*, the security would be limited to the time for which the office was appointed, and it lies on the plaintiff to displace this—and that seems to be just. The obligor knows at the time to what extent he is bound, and may estimate the liability which will devolve on him during the time, but he cannot know what liability may devolve on him at a distant time. Suppose two different instruments in writing were presented to him and he were asked, “will you be surety for one year or for the whole life of the officer, if he continues in office,” would not any man consider there was a great difference between the two. I think, therefore, the presumption is, the defendant proceeded upon the state of things which he knew to exist, and that was, that the officer was appointed for a year, and was liable to be not appointed for a second year; if that was presented to the mind of the surety he would execute the bond with the knowledge that his liability, unless the terms of the instrument were altered, would be over at the end of the year.” And Crompton, J., said, “It is important that we should judge by the rules of law and not by guess. Nothing is better established than that a surety executing such an instrument as this is to be taken to be giving security only in respect of the existing office. When there is a re-appointment he has a right to say the office is not the same.” I refer also to the various authorities cited in that case.

On the whole I am of opinion that this bond was only a continuing security until the expiration of the Treasurer's term of office, which term ended upon his re-appointment in 1863, and at the furthest ended in 1864, under the by-law limiting it to that year; and, as it appears that up to that

period, and years after, the Treasurer duly performed the duties of his office, and the liability of the defendant ceased under the bond, and that at the time of the nomination of the defendant and of his election, he had no interest in a contract with the corporation arising under the bond in question. This application must therefore be discharged.

It is not necessary that I should give any judgment on the other point raised. I however considered the question, and I arrived at the conclusion that, as the defendant's qualification was not objected to at the nomination, but at the time of the polling, when the electors could not nominate another candidate, it would be unjust to the electors, and unreasonable under such circumstances, to deprive them of a further opportunity of electing a person of their choice.

The application must be discharged with costs.

*Order accordingly.*

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REGINA EX REL. GIBB V. WHITE.

*Municipal election—Disqualification—Indians—Enfranchisement.*

An Indian, who is a British subject, and otherwise qualified (in this case, by holding real estate in fee simple to a sufficient amount), has an equal right with any other British subject to hold the position of reeve of a municipality, even though not enfranchised, and though receiving, as an Indian, a portion of the annual payments from the common property of his tribe.

[CHAMBERS, March 23rd, 1870.—MR. DALTON.]

*O'Brien*, for the relator, obtained a *quo warranto* summons to try the validity of the election of the defendant to the office of Reeve of the Township of Anderdon, in the County of Essex.

The statement of the relator complained that Thomas B. White had not been duly elected to the office of Reeve of the Township of Anderdon, and usurped the office under the pretence of an election held on the first Monday in January;

and that Dallas Norvell, of Anderdon aforesaid, merchant, was duly elected thereto, and ought to have been returned at the said election; and the following causes were stated why the election of the said T. B. White to the said office should be declared invalid and void, and the said Dallas Norvell be duly elected thereto, namely: that the said Thomas B. White was an Indian, and a person of Indian blood, and an acknowledged member of a tribe of Indians, and not in any way enfranchised or exempted from the disabilities of Indians, and as such was disqualified from holding the property qualification necessary to entitle him to such office, and that therefore he had not the necessary qualification, either of property or otherwise, and that the said Dallas Norvell was the only other candidate for the said office, and should be declared elected.

There appeared to be no dispute about the facts of the case. The defendant was born in Ontario, as was his father before him; he was the son of the chief of the Wyandottes, or Huron Indians, of Anderdon; he was never "enfranchised" under our statute, and from time to time received his portion of the annual payments from the property of his tribe; he had for the last twelve years been engaged in trade—of late, rather extensively; he had been for some years the owner in fee simple of patented lands in Anderdon, on which he lived; and these lands were not allotted to him from the lands of the tribe, but were acquired by himself: the value was beyond the necessary qualification.

*Osler* shewed cause.

*O'Brien, contra.*

Con. Stat. Can. cap. 9; Con. Stat. U. C. cap. 81; 31 Vic. (Can.) cap. 42; 32, 33 Vic. (Can.) cap. 6; Treaty and Proclamation in Public Acts, 1763 to 1834 [20]. [32]: *Reg. v. Baby*, 12 U. C. R. 346; *Totten v. Watson*, 15 U. C. R. 395; *The Cherokee Nation v. The State of Georgia*, 5 Peters 60; 2 Kent's Com. 72, 73; 3 *Ib.* 381, were cited on the argument.

MR. DALTON.—There is a marked difference between the position of Indians in the United States and in this Province. There, the Indian is an alien, not a citizen. See the case in 5 Peters 1, 27, 58, 60: “The Act of Congress confines the descriptions of aliens capable of naturalization to *free white persons*. \* \* \* It is the declared law of New York, South Carolina, and Tennessee, and probably so understood in other States, that Indians are not citizens, but distinct tribes, living under the protection of the government, and consequently they can never be made citizens under the Act of Congress.”—2 Kent’s Com. 72, 83.

In this Province Indians are subjects. Con. Stat. Can. cap. 9, so speaks of them (see preamble, and sec. 1, also the 16th section of the Act of last session). But authorities are needless for such a proposition. Chapter 9 (now repealed), was the Act in force for many years down to 1869, declaring the rights, and providing for the management of the property of the Indians; and its provisions have much to do with the present matter. The word *Indian* in that Act, (sec. 1) is defined to mean only Indians, or persons of Indian blood, or intermarried with Indians, acknowledged as members of Indian tribes or bands, residing upon lands which have never been surrendered to the Crown, or which having been so surrendered, have been set apart, or are reserved for the use of any tribes or band of Indians in common, *and who themselves reside upon such lands*. But any Indian (sec. 2) who is seised in fee simple in his own right of patented lands in Upper Canada, assessed to \$100 or upwards, is excluded from the definition, and is not an Indian within the meaning of the Act. The Act goes on to provide means for the “enfranchisement” of the Indians, meaning the class so defined, and the apportioning to those enfranchised, of parcels of the lands of the tribe, to be held by such enfranchised Indians in severalty. And it confers certain immunities on the Indians, and subjects them to certain disabilities, always having reference, as I understand, to the above description of the class to which the Act applies. If this Act were



now in force, whatever effect it might have on the defendant's position to be within it, I suppose he would not be within it, for he does not live with the tribes on their reserved land, but is the owner in fee simple of patented lands of greater assessed value than \$100, not set apart from the lands of the tribe, but acquired by himself.

That Act however is repealed, and the Acts now in force are 31 Vic. ch. 42, and 32 & 33 Vic. ch. 6 of Canada. The only immunities or disabilities of an Indian now, whether enfranchised or unenfranchised, relate to the property he acquired from the tribe, and that no person can sell to him spirituous liquors, or hold in pawn anything pledged by him for spirituous liquors. But Indians may now sue and be sued, and have, except as above, so far as I can see, all the rights and liabilities of other subjects.

In *Totten v. Watson*, 15 U. C. R. 392, the Court of Queen's Bench, in the time of Sir John Robinson, decided that the prohibition of sale of land by Indians, applied only to reserved lands, not to lands to which any individual Indian had acquired a title; and from this case and sec. 2, cap. 9, Con. Stat. Can., it is quite plain that an unenfranchised Indian might purchase and hold lands in fee simple. The defendant then has the necessary property qualification. Being a subject he must have all the rights of a subject which are not expressly taken away; then why is he not qualified to be Reeve of a township? It is certainly for the relator to shew why. I think that he is qualified, and that judgment must be for the defendant with costs.

*Judgment for defendant with costs.*

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## REGINA EX REL. FLATER V. VANVELSOR.

*Municipal election—Qualification of candidate—Effect of incumbrances.*

*Held*, that the fact of a property on which a candidate seeks to qualify being incumbered, cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification.

[CHAMBERS, March, 16, 1870.—MR. DALTON.]

It was alleged in the statement of the relator, that Daniel J. VanVelsor had not been duly elected, and had unjustly usurped the office of Deputy Reeve of the Township of Harwich in the County of Kent, under the pretence of an election held on Monday the 3rd of January, 1870, and it was declared that he, the said relator, had an interest in the said election as a voter, and the following cause was alleged why the election of the said VanVelsor to the said office should be declared invalid and void, namely: that the said VanVelsor was not duly or legally elected or returned, in that he was not qualified, not having sufficient property qualification, he being assessed and rated as a freeholder on the last revised assessment roll of the Township, for certain lots, which were assessed and valued in the whole on the said roll, at the sum of \$470; and all the said lots were, at and before the said election, encumbered by a mortgage made by the said VanVelsor, to secure payment of \$1,125, and which was still unsatisfied and undischarged, and, also by a writ of *feri facias* against the lands and tenements of the said VanVelsor and others, and which, at the time of the said election, remained for execution in the hands of the Sheriff of the County of Kent, having been delivered to him on the 1st day of April, 1869, and these incumbrances were much more than the value of the said property.

A number of affidavits were filed on both sides, on which there was much discussion, but the main facts necessary for the consideration of the case, and on which it was determined by Mr. Dalton, were as follows: that the defendant

was assessed as above, at \$470: that the mortgage spoken of was entirely paid before the election: that the above judgment was paid or assigned to the defendant since the election: that, at any rate, since November last, the defendant had in his possession goods liable to execution to an amount greater than the amount of the judgment; but that the writs both against goods and lands still remained in the sheriff's hands.

*John Paterson*, for the defendant, shewed cause:

The defendant having paid the mortgage, that objection falls. The defendant has goods sufficient to cover the execution, and as the writ against goods must be satisfied first, the writ against lands is really no incumbrance.

*O'Brien*, for the relator:

The defendant has up to the present time apparently desired it to be understood that these incumbrances were *bona fide* charges on his property, and it is only when it suits his purpose, that they are pretended to be paid or assigned; but the *fi. fa.* lands is in fact an incumbrance, even if there are goods to satisfy the claim, it binds his interest in the lands, though no sale can take place until the goods are exhausted. [MR. DALTON.—Can the fact of an incumbrance on the property, whereon it is sought to qualify, be taken into consideration here?] The statute is silent on the point, but it contemplates the necessity of the candidate having a property qualification: see 29–30 Vic. ch. 51 sec. 70; and in *Reg. ex rel. Blakely v. Canavan*, 1 U. C. L. J. N. S. 188, it seems to be taken for granted that the incumbrances are to be deducted from the value as rated. There is, however, no express decision on this point.

MR. DALTON.—Substantially the defendant was qualified. Is he technically so under the statute?

At the time of the election the judgment and the writ against lands remained a charge. To satisfy that judgment the defendant had goods sufficient in amount, and a writ upon the judgment against goods was in the hands of the sheriff.

The enactment as to qualification is sec. 70 of 29-30 Vic. ch. 51: "The persons qualified to be elected Mayors, Alderman, Reeves, Deputy Reeves, and Councillors, or Police Trustees, are such residents of the municipality within which, or within two miles of which, the municipality or police village is situate, as are not disqualified under this Act, and have, at the time of the election, in their own right, or in the right of their wives, as proprietors or tenants, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipality or police village, to at least the value following—[Then follow the amounts in different cases, and in this case to \$400 freehold, or leasehold to \$800.] And the qualification of all persons where a qualification is required under this Act, may be of an estate either legal or equitable."

Now if the defendant's assessed qualification of \$470 is to be affected by the charge of the *fi. fa.* lands, that is, if the amount of the judgment is to be deducted from the assessed value in computing the amount, it would perhaps be difficult to decide that the possession of goods by the defendant could avoid that result. For though the goods must first be exhausted before the lands can be sold to satisfy the judgment, or even though the defendant had money in the bank for that purpose, still, if liens and encumbrances are to be taken into account, the *fi. fa.* lands, so long as the judgment is unsatisfied, remains a lien; and it would perhaps require some express provisions to enable me to set up against that lien other countervailing assets, and thus to free the land.

But can charges of this nature be taken into account at all?

I have looked for cases upon this point but find none—I find the point taken in argument, and in one case noticed in the judgment, but never so far as I can see, decided.

The words of the statute are, "have at the time of the election in their own right, or in the right of their wives, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll of such municipi-



pality, &c.” If the clause means such a thing, no word is said as to the *value beyond incumbrances*, or any thing at all of value, except the value as “rated” by the assessor. The facts necessary in strict grammatical construction are, that they shall have the estate at the time of the election, and that it was rated in their names at the proper amount on the last revised assessment roll.

But how is it held in analogous cases? Take the case of voters at municipal elections—their right depends upon the 75th section (now varied by the Statute of Ontario, but not as affecting the present matter)—they must be severally (but not jointly) rated on the then last revised assessment roll, for real property held in their own right or that of their wives, as proprietors or tenants—and the clause declares such rating absolute and final. Certainly in this case the law permits no enquiry into incumbrances.

The only oath that can be administered to a freeholder appearing on the roll to have the proper qualification is, that he is of the full age of twenty-one years, is a natural born or naturalized subject, that he has not before voted at that election, and that he is the person named in the roll: see *Reg. ex rel. Ford v. Cottingham*, 1 U. C. L. J. N. S. 214; *Reg. ex rel. Chambers v. Allison*, *Ib.* 244.

Then as to parliamentary elections, (section 81) the law, as I take it, is the same. The requirement is, that the voter should be entered on the last revised assessment roll, as the owner or occupant of real property of the actual value, &c. No incumbrance affects the right. There can be no inquiry as to qualification except as to the identity of the party with the name on the roll.

I will notice two other cases where the Legislature has intended an opposite effect, and has expressed it very clearly.

As to candidates at parliamentary elections, the qualification is to the value of £500 sterling, expressed to be “over and above all rents, charges, mortgages, and incumbrances, charged upon, and due, and payable out of, or affecting the same;” Imp. Stat. 3 & 4 Vic. cap. 35, sec. 28. No one can have doubt or hesitation here.

Then take the case of magistrates. By Consol. Stat. Canada, cap. 100, sec. 3, the qualification must be "over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents, &c., payable out of or affecting the same."

Looking at the careful and explicit language used in these cases, it seems not unreasonable to conclude that, in the case of municipal candidates, the Legislature meant no more than the grammatical meaning of the language used conveys, and I therefore think that the defendant being rated in his own name on the last revised assessment roll for a freehold estate of the proper value, and having that estate at the time of the election, is properly qualified, and that the judgment standing against him does not affect it.

I must give the costs against the relator, as it does not appear that exertions were made to ascertain whether the incumbrances charged as affecting the valuation were existing at the time of the election.

*Judgment for defendant with costs.\**

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#### REGINA EX REL. PHILBRICK V. SMART.

##### *Municipal law—Qualification of candidate—Incumbrances.*

The amount of real property rated to a candidate on the assessment roll is so far conclusive as to his qualification that incumbrances cannot be taken into consideration to reduce it.

The distinction between real and personal property discussed.

[CHAMBERS, February 24, 1871.--MR. DALTON.]

The relator complained that the defendant was not qualified to sit as a councillor for the municipality of the village of Yorkville, in this, that he did not possess the necessary property qualification. The real property rated to the defendant on the roll was sufficient in amount, but it was shewn that there was a mortgage on the property for a

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\* See next case.—REP.

sum which would reduce the interest of the defendant in the property to an amount below that required by the statute; and it was contended that the defendant had not, therefore, the required qualification.

*M. C. Cameron*, Q.C., shewed cause, citing *Reg. ex rel. Flater v. Van Velsor*, ante p. 319; 6 C. L. J. N. S. 151. *Anderson* (*Tilt* with him) shewed cause.

MR. DALTON.—The question in this case as to the property qualification of the defendant depends upon the construction of the 70th section of the Municipal Act. But, for the understanding of that section, it is necessary first to refer to the assessment law.

There is this distinction between the assessment of real and personal property. In the case of real property it is the *land itself* that is assessed, always at its full fee simple value without regard to charges or encumbrances, and not a man's estate or interest in the land. If the owner has mortgaged to more than the whole value, the land will still be assessed against him at the value of the fee, just as though the mortgage did not exist. And if the owner's estate be less than a fee, the rating against him is still the same, the full fee simple value.

As to personal property, it is different. The theory of law as to this is, that a man's real interest in the property is to be taxed; not the property. There is excepted from assessment "so much of the personal property of any person as is equal to the just debts owed by him on account of such property." So that if I buy land worth £100, and mortgage it for that full amount, I am nevertheless taxed for it at £100; whereas if I buy goods to £100, and do not pay for them, I cannot be taxed in respect of those goods at all. It is necessary to bear this distinction in mind in reading the 70th clause of the Municipal Act, as to the qualification of Mayors, Aldermen, Councillors, &c.

By that section they are declared to be such persons "as

are not disqualified under this Act, and have at the time of the election in their own right, or in the right of their wives, as proprietors or tenants, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll to at least" the several sums particularly specified in the clause.

Now if I am right in what I have said above, there is no such thing under the assessment law as rating a man's legal or equitable freehold or leasehold, unless those words are taken to apply to the land in which the freehold or leasehold exists without reference to the holder's interest or estate in it; and they must necessarily be held to refer to a "freehold or leasehold" in *land*; that is, "*rated* in their own names," &c. *Land*, understood, is the substantive that "rated" agrees with in clause 70; for it is only *the land* that is rated, and that in but one way, at its full value in fee simple without any regard to the quantity or quality of any man's estate or interest in it.

Looked at in this light the word "rated" in the clause, must apply to the *land in which the estate is*, and not to the *estate in the land*, for no man's estate can be rated as such; nor is in fact so, only the fee simple of the land itself. And to apply this construction to the present case, the defendant may be held to be qualified, because he is an equitable freeholder in his own right in *land*, that is, *rated* at the proper amount in the defendant's name on the last revised assessment roll, which interest he continued to hold at the elections; and this without any reference (for the statute says nothing about it,) to the real value of the defendant's estate.

But, it is said, this construction makes it unnecessary for a councillor to have any qualification in real estate at all, if he be but the holder of land assessed against him on the last assessment roll at the proper amount; for such a freeholder, say to \$600, who has mortgaged to that amount, if he did but continue to hold the equity of redemption, would, under this construction of the statute, be qualified as



a candidate; and this is true. But take another view of the clause. In every case a leaseholder for a term not less than a year is held to be qualified by a holding of property to double the amount of a freeholder in the same case. In *this* case then, for example, a leaseholder of property rated in his own name, on the last revised assessment roll, at \$1200 in respect of the leased premises, would be qualified as a candidate. Observe, the statute says nothing about the rent paid, and the rating is the only possible test.. That rent might, and probably would be the full value for the occupation of the premises. The very statement of this case shews that his interest as lessee would be of no pecuniary value. But he would be qualified as a councillor.

The interest of such a lessee seems to me, for the present purpose, very like that of the owner in possession of the equity of redemption in fee, where the property has been mortgaged to the full value. Neither of them has an interest of any value in a commercial sense. But, under the statute, it is plain that every municipality in the country might be represented by such lessees, whose united interests in their leases could not be sold for a dollar. Look, too, at the case of a life-tenant; he has a freehold, and, if the land is rated at the proper value, is qualified by the express words of the Act; but if the life on which the estate depends be near its close, the life-tenant's interest may be merely nominal in value. Why, then, should it seem inconsistent or extraordinary that a freeholder should be held qualified who has incumbered (or holds an estate previously incumbered) to an amount which reduces the actual value of his *interest* below the prescribed rated value of the land.

The statute may perhaps have reference to other things than the real value of the interest of the candidate. It may regard the payment of taxes, or may assume something for the social position of those who are the possessors of property of the prescribed value, whatever the money value of their real interest in it. In *Reg. ex rel. Blakeley v. Canavan*, 1 U. C. L. J. N. S. 188, some instances in the

statute law are pointed out in the judgment of the Hon. Mr. Justice Morrison, where this real interest in the party is stipulated, and the plain and direct language by which the value in those cases is directed to be over and above all charges and incumbrances, is very observable. Unmistakable words are there used to shew that it is the balance left to the party, after deducting all claims, that is intended. Such language is entirely wanting in this statute. The value of the rating is all that is specified; and it is plain that, in the case of tenants for life and leaseholders, the qualification of the candidate does not require an interest in him of any money value whatever. The declaration to be made by the elected officer before taking his seat has been pointed out to me, but by that he merely declares himself to be seised and possessed to his own use and benefit of such an estate as qualifies him to act in the office *according to the true intent and meaning of the municipal laws*, which leaves the matter just where it was.

In *Reg. ex rel. Flater v. Van Velsor* 6 C. L. J. N. S. 151, I had occasion to decide a point very similar to the present. The decision was not appealed against, and is consistent with my present opinion.

I can only understand the word "rated," in clause 70, to mean rating under the assessment law; so that, whatever the statute may mean, I think it does not mean to prescribe the real value of the interest of the candidate in the land on which he qualifies. I shall, therefore, without further endeavouring to speculate upon it, follow the grammatical construction of section 70, and, applying it to this case, it appears that the defendant has an equitable freehold in land rated at the proper amount in his own name on the last revised assessment roll, and that he had the same estate at the time of the election, and I therefore think he is qualified.

*Judgment for defendant, with costs.\**

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\* This decision was subsequently upheld by Mr. Justice Galt on appeal from Mr. Dalton's order, and see previous case—*REP.*

## REGINA EX REL. COYNE V. CHISHOLM.

*Municipal Election—Right of Candidate to resign—C. S. U. C. c. 54. sec. 97, sub-sec. 5—Municipal Act of 1866, sec. 110, sub-sec. 6, and sec. 113.*

A candidate for the office of reeve, who is proposed and seconded at the nomination meeting, may, with the consent of his proposer and seconder and of the electors present, withdraw from his candidature.

A voter, who nominated another for a municipal office, having at the meeting permitted his candidate to retire from the contest, without expressing at the time any objection to his withdrawal, cannot afterward insist upon having the name of his nominee published in the list of candidates, or entered as such upon the poll book.

[CHAMBERS, February 10, 1871.—MR. DALTON.]

The statement of the relator complained that Kenneth Chisholm had not been duly elected, and usurped the office of reeve of the village of Brampton, under the pretence of an election held on the 2nd January, 1871.

The grounds stated were: that at the nomination the said Kenneth Chisholm, Jacob P. Clark, James Fleming, John Haggart, and the relator, were duly proposed and seconded as candidates for the said office of reeve, and that no other candidates were proposed within one hour after the meeting of the electors for the said nomination: that the said John Haggart was proposed for the said office by the said Kenneth Chisholm, and seconded by the said relator: that no one of the said persons so nominated retired or withdrew from the said nomination within one hour from the time the said meeting was held and the said nominations were made: that no poll was demanded for the said office of reeve, but a poll was granted and allowed by the said returning officer: that a show of hands was called for on behalf of John Haggart, and a large majority of the electors present appeared to be in his favor: that the said John Haggart then said (but after a considerable number of the electors who had been present had left the meeting) that he would retire from and not contest the said election: that the relator, who was his seconder on his said nomination, never consented to the retirement of the said John Haggart, and on the day following the said nomination informed the said returning

officer that he must post up the name of John Haggart as one of the persons proposed as reeve, as he, the relator, insisted that Haggart should be voted for at the election: that John Haggart himself notified the said returning officer, two days before the election, that he was a candidate for the said office, and requested the returning officer to enter his name on the poll-book as a candidate: that the returning officer did not post up in the office of the clerk of the said village, or anywhere else, the name of John Haggart as one of the persons proposed as reeve, but refused to do so, and his name was not at any time so posted up: that on January 2nd, the day of the said polling, John Haggart presented himself as a candidate to the returning officer: that the returning officer would not place the name of the said John Haggart in his poll-book as a candidate for reeve, and would not record any votes for him, although many (some eighty-two) were tendered for him; and that if the returning officer had received votes for John Haggart, he would have been elected reeve of the said village, instead of Kenneth Chisholm, who was declared duly elected.

The returning officer, in his affidavit, swore as follows:—

1. “ That I was chairman of the meeting of electors held in the village of Brampton, on the 19th December last, for the nomination of candidates for the office of reeve, and I took the chair thereat at noon of the said day; and in the course of an hour thereafter, five candidates, being the same as are mentioned in the statement of the relator herein, were duly nominated for said office; and after such nomination they all addressed the electors present at the meeting; and John Coyne, the said relator, and James Fleming, and John Haggart, at the close of their respective addresses, declared that they were not candidates for the said office, and withdrew from the contest therefor; and as each of them did so, I struck his name off the list of candidates for said office; and no person present at said meeting made any objection to the withdrawal of the said candidates; and although the relator was present at said meeting, and knew of the with-



drawal of said Haggart and the said other candidates, he did not object thereto ; and I believe the said relator and the said John Haggart also believed at the time that all the said withdrawals were complete abandonments of their candidatures by said parties.

2. "After the said relator and the said John Haggart and James Fleming had withdrawn as aforesaid, I read out the names of the defendant and Jacob Paul Clark as the candidates for the said office (the relator being present and making no objection), and I adjourned the meeting to the 2nd day of January, stating at the time that the candidates for the said office who remained on the list after the said withdrawals, were the defendant and said Clark.

3. "That there was no show of hands called for for said candidates ; but the said John Haggart, in his address to the electors, stated that if he was to be opposed, he would not contest the election ; and in order to see what opposition he would be subjected to, he called on those who were in his favor as against Mr. Clark (who was thought to be the only person who would contest the election with him), to hold up their hands ; but only a small proportion of the electors did so, and the majority of those who did, were in favor of said Haggart ; and he then asked Clark if he intended to contest the election with him, and Clark said he did ; whereupon the said John Haggart announced that he withdrew from the contest, and desired me to strike his name from the list of candidates, and I did so.

4. "All the proceedings aforesaid took place at said meeting, and were part of the proceedings thereof, before I announced that the only candidates standing were the defendant and said Clark ; and no one made any objection to said proceedings or to any other of the said withdrawals ; and the relator was present during the whole time."

*R. A. Harrison, Q.C., and J. K. Kerr, shewed cause :*

1. Though at first a candidate, yet, under the authorities and the circumstances of this case, Haggart was not, at the close of the nomination, a candidate.

2. The relator acquiesced in the withdrawal, and cannot now be heard : *Reg. ex rel. Rosebyush v. Parker*, 2 C. P. 15; *In re Kelly v. Macarow*, 14 C. P. 457 ; *Reg. ex rel. Bugg v. Bell*, 4 Prac. Rep. 226.

3. Where there is no probability shewn that a new election would make a change in the person elected, mere irregularity is no ground for setting aside the election. See *Morris v. Burdett*, 2 M. & S. 212 ; *Reg. ex rel. Charles v. Lewis*, 2 Ch. R. 171 ; *Reg. ex rel. Walker v. Mitchell*, 4 Prac. Rep. 218.

*J. H. Cameron*, Q.C., and *Dr. McMichael*, supported the summons, citing *The Queen v. Mayor of Leeds*, 11 A & E. 512; *Reg. v. Bower*, 1 B. & C. 585; *Reg. v. England*, 2 Leach, C. C. 767; *Reg. v. Woodrow*, 2 T. R. 731; *The King v. Burder*, 4 T. R. 778 ; Comyn's Digest, Title Indictment, D.; Municipal Act of 1866, sec. 186 ; Har. Mun. Man. p. 91; *Reg. v. Mooney*, 20 L. T. Q. B. 265 ; *The Queen v. Preece*, 5 Q. B. 94.

MR. DALTON.—Upon the objection which has been urged to the defendant's election as reeve of Brampton, I will read the affidavit of Mr. McCulla, the returning officer, as containing a statement of the facts upon which I act. Mr. McCulla is in an official position, independent of both parties, and gives a very clear statement of what occurred, which I have no doubt, is quite correct. Indeed I do not know that there is any dispute at all as to what took place at the nomination.—[Mr. Dalton here read the extract from the affidavit of the returning officer, which is given above.]

It seems to me to be very clear, whatever may be the derivation of the word, that a "candidate," in the sense of the statute, is one put forward for election, no matter whether with or against his own will; from which it would seem to follow that he cannot, without the consent of others, resign. His assent is not necessary to his candidature, but he must have a proposer and seconder. He need not be present at the meeting, and his dissent from the proceeding is unavailing.

But the question is, can a candidate, once nominated, be withdrawn? It is difficult to comprehend why this cannot be done before the close of the meeting, with the assent of all concerned; for every one then acts of his own free will, with a full knowledge of the facts. Contracts can be dissolved by the will of those who made them. There are exceptions, but it is *generally* true; and it is the *general* rule that the legal effect of an action may be annulled or reversed by the common agreement of *all* who are concerned. Why then, before being acted on, cannot a nomination be withdrawn, as here, by the candidate himself, his proposer and seconder, and the electors present? It is true that the clause of the Act does not speak of any power of resignation or withdrawal, but directs that the poll-book shall contain the names of the candidates "proposed and seconded," which no doubt means the names of *all candidates* proposed and seconded. But the answer to this seems to be, that when the nomination is withdrawn at the meeting by the agreement of every one affected by the nomination or withdrawal, it is as though that candidate had never been proposed and seconded at all; for he does not continue to be to the close of the meeting, and is not then, a "person proposed" for the office. That this is the construction put upon the statute in practice, is very clear; for nothing is more common than for a number of candidates to be proposed, where there is no intention on the part of any one that they should contest the election; and upon their withdrawal, it has never, that I know of, been suggested until now, that it may be demanded after the meeting that their names shall be entered on the poll-books.

From the nature of the proceeding, the electors and the returning officer are entitled to know, at the close of the meeting, who are the candidates; for in case there is but one candidate the returning officer is to declare him elected; and in case there are more candidates than one, the returning officer, on the day following the nomination, is to post up the names of the candidates. So that I do not under-

stand how Mr. Haggart's or Mr. Coyne's communication with the returning officer after the nomination day can affect this proceeding. But suppose the first case had happened, and Mr. Chisholm had been the only candidate remaining ; then the returning officer, with the assent of all the candidates, their proposers and seconders, and of the electors present at the meeting, would on the spot have returned Mr. Chisholm as reeve. If it is asserted that an election so conducted would be void, I must say that only judicial decision could make me assent to it. I have been speaking of the statute as though the relator here were an elector, not present at the meeting, who had afterwards voted at the election of Mr. Haggart. His position would, in my opinion, be very different from that of Mr. Coyne ; for if I am wrong in supposing that the proceedings at the election were legal, there are still reasons which apply *ad hominem* to prevent Mr. Coyne from setting up the objection. It was urged, upon the argument, that this proceeding was so much in the interest of the electors, that the truth of the matter must alone be regarded, and that the conduct of the relator or Mr. Haggart could not here be set up to exclude the truth. But the cases cited by Mr. Harrison and Mr. Kerr are quite clear on the point that the conduct of the relator may waive objections otherwise good, or may stop him from alleging them. Indeed, he is regarded as any other plaintiff, claiming in his private right.

Now, Mr. Coyne was present throughout the whole proceedings at the meeting. He must have heard the withdrawal of all the candidates but Mr. Clark and Mr. Chisholm ; he must have heard the returning officer announce that they were the only candidates remaining ; and yet he allowed the meeting to close—all present supposing such to be the fact—without expressing objection or dissent. I think he must be bound by the rule in *Pickard v. Sears*, 6 A. & E. 649, and the kindred cases. Surely this is estoppel by conduct. It is very easy to suppose cases where such a course would completely throw the electors—especially those. opposed to



Mr. Haggart—off their guard, if they were to find the next morning that Mr. Haggart was still in the field. I think the course taken in this election was legal; and that, if otherwise, neither Mr. Haggart nor Mr. Coyne can be heard to urge this objection. I think there should be judgment for defendant with costs.

*Judgment for defendant.*

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REGINA EX REL. PATTERSON V. VANCE.

*Municipal Election—Two relations—First collusive—Right of second relator to attack it.*

A stranger to the proceedings in a *quo warranto* matter may, if otherwise qualified, attack them on the ground that they have been initiated in collusion with the defendant, but he cannot set up irregularities, as such, unless indeed the relator has committed them purposely, as for example to secure the failure of his own proceedings.

[CHAMBERS, February 10, 1871.—MR. DALTON.]

The relator obtained from Mr. Justice Wilson a writ of summons in the nature of a *quo warranto*, returnable before the Judge of the County Court of the County of York, to set aside the election of the defendant as one of the aldermen for the City of Toronto. Another summons was shortly afterwards issued by Mr. Dalton (in ignorance of the application to Mr. Justice Wilson,) on the relation of one Riddel, the unsuccessful opponent of the defendant at said election, to unseat the defendant, and to seat the relator Riddel in his place. This latter writ was returnable before one of the Judges of the Superior Courts in Chambers.

*Harrison*, Q. C., on behalf of Vance, applied to set aside Dr. Riddel's writ, or to make it also returnable before the County Judge, and

*K. Mackenzie*, Q. C., also obtained a summons to set aside Patterson's writ, on the ground of collusion between him and Vance, and for various alleged irregularities, which,

however, it is not necessary to refer to, as the case went off on other grounds.

Both summonses came on for argument together, the latter being heard first, the former depending upon the result of it.

MR. DALTON.—The objection taken to the summons, which is indeed the only cause shewn to it, is, that Dr. Riddel, on whose behalf it is moved, cannot be heard to object to proceedings to which he was no party. Dr. Riddel is an elector of the ward, and was a candidate at the election.

I agree in this objection to a certain extent. One who is no party to a proceeding cannot generally be heard to object to irregularities in it, even where he has the right to complain that the proceeding is in bad faith, and affects himself.

A man may be heard to say that a proceeding between others is fraudulent against him, and injurious to him, and he may attack it on that ground; but he cannot be allowed to interfere between others, and set up errors of practice, even though they be such as a *party* could successfully urge. I liken this case, in my mind, to that where a creditor attacks a judgment of a third party against his debtor. He can shew that is a fraud against himself, but he cannot shew, though it may be the fact, that every step to judgment in the cause has been irregular: *Brent v. Perry*, 5 U. C. R. 538; *Armour v. Carruthers*, 2 Prac. Rep. 213; *McGee v. Baird*, 3 Prac. Rep. 9; *Cochrane v. Scott*, 3 Prac. Rep. 32; *Nicholls v. Nicholls*, 3 Prac. Rep. 201.

So here, Dr. Riddel being a voter and a candidate at the election, can set up, if it be true, that the proceedings of the relator are not in good faith—not what they appear to be, but are intended really to favor the sitting member; because he thus shews that his interests are unfairly prejudiced, but he cannot object to irregularities in the relator's proceedings. But, to be accurate, when I say that this applicant cannot set up irregularities, I mean strictly as irregularities; for I do not suppose that it is not open to Mr. Mackenzie to argue, if he can make it out, that the irregularities have

been purposely and fraudulently committed by the relator to insure the failure of his own proceedings. Whether the neglect or omission to file any statement of the relator is of such a nature that a third party can set it up, I need not discuss, as it turns out, those documents *were* filed. They had been, I am told, carried to his office by the attorney of the relator, after having been filed, but have now been restored. That I look at them now, under the circumstances, I hope no one will regard as a precedent.

The one point that I notice on this application is, whether the proceedings of the relator are *bona fide*, or are, as is suggested, intended to embarrass the cause that they affect to help.

Several circumstances connected with these proceedings have been relied on by Mr. Mackenzie, which I shall not detail. The relator supported the sitting member at the election, and I quote the language of one of the affidavits as to his conduct since he has commenced these proceedings, where it is stated :—“He (the relator herein) claimed that he had voted at the election in question for Hynes, Adamson, and Vance, and although his vote was not recorded for Vance he would still have it made right by having it entered for Vance.” In another affidavit, that of the person who served this summons, occurs this passage :—“A few minutes after I served the wife of the said relator with a copy of the annexed summons, I met the said Patterson near his residence, and informed him that I had served his wife with the said summons, when he said, with an oath, that he was not going to attend until he got his pay.”

The relator makes no answer to these things, so it is hardly necessary to discuss his conduct further; and I now set aside the *quo warranto* summons issued by the relator Patterson.

In doing so, at the suit of Dr. Riddel, it is not under the supposition that any result of these *quo warranto* proceedings could be an estoppel against him. They, however, do affect his own proceedings; and he has therefore, it seems to me, a right to be heard upon the ground on which I now decide.

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## REGINA EX REL. PATTERSON V. CLARKE.

*Municipal election—Contract with corporation—Lease—29-30 Vic. ch. 51, sec. 73.*

A municipal corporation by by-law granted to defendant upon certain conditions a right to build a dam and bridge across a river, in consideration of which he agreed to keep it in repair for forty years at his own expense, but if he should make default the privilege granted by the corporation was to cease. The dam and bridge were built and duly kept in repair by defendant.

*Held* 1. That the defendant was interested in a contract with the corporation;

2. But that he was not disqualified as a municipal councillor, the contract amounting to a lease from the corporation of upwards of twenty-one years.

[CHAMBERS, February 21, 1871.—MR. DALTON.]

This was an application to unseat the defendant, founded on his alleged interest in a contract made with the defendant by the corporation of the township of Caledon, for which he had been elected a councillor.

The alleged interest arose from the grant to the defendant of the right to erect a dam across the river Credit, granted by by-law of the corporation. The by-law, which was passed in December, 1863, recited, that whereas defendant had applied to the council for liberty to build a breastwork and dam opposite lot 24, on the 4th line, west, where the Credit crosses said road, and that defendant had agreed, for himself, his heirs and assigns, to build a good and substantial bridge on the breastwork, (describing its dimensions,) to be made perfectly safe for travel, and had agreed to keep the same bridge in good repair, and to re-build the same when necessary, at his own expense, and so to keep it in repair for forty years from the 1st of January, 1864, upon the council granting him the privilege of erecting and keeping up the breastwork and dam for the same time, and advancing to him \$80 to assist in building the bridge: it was enacted by the corporation that the defendant, his heirs and assigns, should be granted the privilege of erecting and keeping up the said breastwork and dam for that time, upon the terms and conditions above mentioned. And it was



provided that if, at any time during the forty years, the defendant, his heirs or assigns, should make default in the conditions, or any of them, the privilege granted should cease.

This by-law was at once acted on; the grant contained in it was accepted by the defendant; the \$80 was paid; and the dam and bridge were built, at an expense of \$400, by the defendant, and have been, as it appears, duly kept in repair, and everything was satisfactory between the parties themselves; the defendant holding the right to continue the dam for the specified time, with the obligations to keep all in repair.

*Fleming* shewed cause :

1. There is no such contract shewn to exist with the corporation as disqualifies the defendant.—[MR. DALTON.—He has, however, a very strong interest to keep up the bridge, and it is this interest which the statute was intended to guard against.]—There is nothing obligatory on Clarke, nor could any contract be enforced against him at law; there can be no legal difficulty between him and the corporation. Neither is there any equitable or even moral obligation on Clarke to repair the bridge: it is simply a question for his discretion as to whether it is best for himself to do so or not.

2. If, however, it should be held that there is a contract, it is in the nature of a lease for forty years, and the defendant is not disqualified.

*Beynon*, contra, cited *Regina v. Francis*, 13 U. C. R. 116; *Reg. ex rel. Mack v. Manning*, 4 Prac. Rep. 73.

MR. DALTON.—Upon the facts above set forth, it was objected that the defendant could not be a councillor for the municipality, as he is a person having an interest in this contract with the corporation. There was no other objection to his election, and he seems to have been elected by a large majority.

The defendant's counsel has strenuously argued that

defendant has *not* an interest in a contract with the corporation within the meaning of the statute. It seems to me to be quite beyond question that he has.

But the defendant also contends that he is within the exception to sec. 73, which provides that no person shall be held to be disqualified from being elected a member of the council by reason of his having a lease of twenty-one years, or upwards, of any property from the corporation; and I agree with him that he is.

The question is, whether the defendant's interest, under the above by-law, comes within that definition.

Under the by-law, the defendant has the right to maintain his dam upon the property of the corporation for forty years from 1st January, 1864, upon his keeping always in repair, during that time, the road over it. Upon his failure in this, the right is to cease.

Upon examining the authorities, I think this is a lease.

First, then (*Shep. Touch.* 266), "A lease doth properly signify a demise or letting of lands, rent, common, or any hereditament, unto another, for a lesser time than he that doth let it hath in it." And as to the manner of making a lease, I think this by-law, accepted and acted on by defendant, is a sufficient and proper way for granting this interest, and that it binds the corporation.

Secondly, as to the nature of the interest granted. It is said in *Platt on Leases*, p. 24, "The subjects of demise are various, and, generally speaking, comprehend incorporeal as well as corporeal hereditaments. Thus, not only land, but advowsons, corodies, estovers, ferries, fisheries, franchises, rights of common, rights of herbage, rights of way, titles, tolls, and other things of a similar kind, may be leased for lives or years;" and in *Sheppard's Touchstone*, p. 268, the law is thus stated: "Leases for life, or years, or at will, may be made of anything, corporeal or incorporeal, that lieth in livery or grant; and also leases for years may be made of any goods or chattels."

This is a valuable right, granted upon the property of the corporation, and it lies in grant, being incorporeal.

Then, as to the formal words of a lease, I cite again *Sheppard's Touchstone*, p. 272: "Albeit the most usual and proper making of a lease is by the words, demise, grant, and to farm let, and with an *habendum* for life or years, yet a lease may be made by other words; for whatsoever word will amount to a grant will amount to a lease, and therefore a lease may be made by the word give, betake, or the like."

But there is here no rent reserved, nor any duty, unless it be the duty to repair. Upon this (*Ib.*, p. 268), it is said: "Whether any rent be reserved on a lease for life, years, or at will, is not material, except only in the cases of leases made by tenant in tail, so as to bind the issue under Statute 32 Henry VIII., ch. 28; husband and wife, so as to bind the wife and her heirs; and ecclesiastical persons and infants."

Thus, there is a valuable right in the land of this corporation granted to the defendant, by competent means, for a period of years having a determinate beginning and ending, the reversion being in the corporation. Then, if this is not a lease, under the authorities cited, what is it? It is surely a grant, but a grant of an incorporeal hereditament with all these conditions *is* a lease.

I am glad that the authorities warrant me in saying that the case is within the words of the exception, for it is completely within its spirit. I see that the grant is made to the defendant, his heirs and assigns; but it is a chattel interest, and would go to the executors.

The position of the defendant in this matter, having been created by by-law several years ago, was perfectly well known. The relator had no fact to discover by means of this application, and, I think, should therefore take the ordinary consequences to an unsuccessful party, of payment of costs.

*Judgment for defendant, with costs.*

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## BLACKBURN V. CAMERON ET AL.

*Change of venue—Fair trial.*

When, in an action for a libel contained in a newspaper, the plaintiff lays the venue in a county distant from that in which the newspaper is published and the parties reside, so that the trial may be free from local influences, it will not be changed to the county in which the cause of action arose, merely because it would be more convenient and less expensive to try the case in the latter county.

The obtaining of a fair trial must overbear every consideration of mere convenience.

[CHAMBERS, February 22, 1871.—MR. DALTON.]

The defendants published in their newspaper in London, as an advertisement, a letter directed to the electors of one of the wards of the city, purporting to be signed by one F. Evans Cornish, containing libellous statements of the plaintiff, who was one of the proprietors of another newspaper in the same locality. This advertisement, it was alleged by the plaintiff, was inserted maliciously. In subsequent issues of their paper the defendants editorially referred to this letter, and, as was claimed by the plaintiff, made themselves responsible for the libels, whilst pretending to be indifferent between the plaintiff and Cornish, who, as was also asserted by the plaintiff, was a man of straw.

The venue being laid in the County of York, the defendants obtained a summons calling on the plaintiff to shew cause why it should not be changed to the County of Middlesex, upon the grounds that the cause of action, if any, arose in the County of Middlesex, and not in the County of York: that all the witnesses to be subpoenaed on behalf of the defendants resided in the County of Middlesex: that there were no witnesses on behalf of the plaintiff residing in the County of York, and that the cause could be more conveniently tried in the County of Middlesex than in the County of York; and on grounds disclosed in the affidavits and papers filed.

The defendants in their affidavit stated that the extra expense of trying the case in Toronto, instead of London, would be at least \$250, besides the inconvenience to all parties concerned.



On the part of the plaintiff was filed his own affidavit, setting out the letter containing the alleged libel and the subsequent articles which appeared in the defendants' newspaper, both in the daily and weekly editions, which had a large circulation in the City of London and County of Middlesex. The plaintiff, in his affidavit, further stated, "that the principal object of the defendants in continuing for so long the said articles was to create a prejudice in the minds of persons who might read them in favor of the defendants, and against me in this action, and my brother in an action brought by him against the defendants for the publication of the said libellous article or advertisement: that by the effect of the said articles I shall be prejudiced, and cannot depend upon a fair trial of this action in the said County of Middlesex: that the municipal election in ward No. 3 of the said City of London was about to be held at the time of the publication of the said article or advertisement, and created much excitement and political feeling in the said City of London, and many persons, as I verily believe, have been thereby led to form strong opinions upon the subject of this action adverse to me and my rights therein, and on this further account I verily believe that the chance of a fair and impartial trial of this cause in the County of Middlesex will be much lessened: that the statements and insinuations contained in the said article or advertisement are entirely false and without any foundation whatever; that I and my said brother are in good circumstances, and owners of a large amount of real and personal property, and any additional expense incurred by the defendants, owing to the venue remaining in York, could easily be recovered from us, or either of us; that I do not believe that the witnesses named in the sixth paragraph of the affidavit of defendant John Cameron are all necessary witnesses upon the issue joined herein, nor do I believe that the defendants will call more than four or five of them upon the trial of this cause."

*C. Robinson*, Q.C., shewed cause.

The material on which the summons is based is defective in this, that the ground of defence is not set out: *Montgomery v. Gale*, 6 C. L. J. N. S. 13; *Clulee v. Bradley*, 13 C. B. 607; *Ladbury v. Richards*, 7 J. B. Moore 82. Under the circumstances of this case the venue should not be changed to Middlesex. The plaintiff, being *dominus litis*, laid it in York, so that a fair trial might be had, which could not be expected at London. There is a difference between this case and that in which the defendant applies on the ground that a fair trial cannot be had; and especially the venue ought not to be changed when the defendant has been endeavoring to create a prejudice in his own favor by articles published since the commencement of the suit. He cited *Walker v. Brogden*, 17 C. B. N. S. 571; *Channon v. Packhouse*, 13 C. B. N. S. 341; *Moore v. Boyd*, 3 Prac. Rep. 374; *Watt v. Daniell*, 1 B. & P. 425; *Helliwell v. Hobson*, 3 C. B. N. S. 761; *Durie v. Hopwood*, 7 C. B. N. S. 835; *Diamond v. Gray*, 5 C. L. J. N. S. 95; *Seely v. Ellison*, 6 Bing. N. C. 229; *Galaher v. Cavendish*, 3 Ir. L. Rep. 375; *Dowling v. Sadleir*, 3 Ir. C. L. Rep. 606; *Roche v. Patrick*, 6 C. L. J. N. S. 129; and see 4 C. L. J. N. S. 189. He also referred to an analogous case of *Davey v. Scott* recently decided by Mr. Dalton.\*

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\* In this case the defendants, after declaration and before plea, applied to change the venue from Frontenac to Lennox and Addington, upon affidavits shewing that the action was for an alleged libel contained in an article published in the "Canada Casket," a temperance newspaper conducted by them at Napanee; that the parties all resided in the town, and the witnesses on both sides would be called from it and from the surrounding neighbourhood.

The affidavits filed by the plaintiff in reply stated that a prejudice in favor of defendants had been created throughout the County of Lennox and Addington, both by a series of temperance lectures recently delivered there, and also on account of the publication by defendants of a circular, which had been sent to the members of the different temperance organizations in the county, inviting them to contribute towards the formation of a fund to be applied in defraying the expenses incurred in defending this action. Affidavits were filed on both sides as to the probability of obtaining a fair trial in the latter county.

In giving judgment discharging the summons, Mr. Dalton said, "The publication by the officers of the temperance lodge of the notice put in,

*C. S. Patterson, contra.*

The Courts will not look at newspaper comments for the purpose of changing a venue, unless the matters which it was said would be likely to prevent a fair trial are of general and public interest. The present case is peculiar, as it is a quarrel between two rival newspapers. [MR. DALTON.—Are they not in the eyes of the public, champions for contending parties?] Even if so, there will be a counter prejudice created in favor of the plaintiff. [MR. DALTON.—But the plaintiff does not seem to have commented in his newspaper upon the matter in litigation, even if that would help your case.] The convenience and extra expense of trying the case in Toronto is a sufficient reason for its removal to London, where the majority of the witnesses reside.

MR. DALTON.—The plaintiff had a right to lay his venue in York, nor do I think the balance of expense and convenience outweigh the reasons given for laying it where he did. I decline therefore to make the order. The costs will be costs in the cause.

*Summons discharged.*

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addressed to the members of the temperance associations, influential bodies in the County, is an attempt to influence public opinion as to the matters of this suit, which must in justice prevent the success of the defendants' application to change the venue to Lennox and Addington. The defendants are sufficiently connected with this proceeding. I refer to *Penhallow v. The Mersey Dock and Harbour Board*, 29 L. J. Ex. 21, and to *Walker v. Brogden*, 17 C. B. N. S. 571. The obtaining a fair trial must overbear every consideration of mere convenience. There are many affidavits on either side as to whether or not a fair trial can be had in Lennox and Addington. Without pretending absolutely to decide between these different opinions, I cannot but see that this publication, made to the members of the several temperance societies in the County, has a natural tendency to create a prejudice against the plaintiff in this suit. It seems to me, therefore, impossible, under the circumstances, to yield to this application, whatever may be, in other respects, the balance of convenience as to the place of trial."

## WEAVER V. BURGESS ET AL.

*Ejectment—Interrogatories.*

The provisions of the C. L. P. Act, with reference to interrogatories, are applicable to proceedings in ejectment.

[CHAMBERS, March, 13, 1871.—MR. DALTON.]

An application was made by one of the defendants to administer interrogatories to the plaintiff in an action of ejectment.

*O'Brien* shewed cause, and objected that the provision of the Common Law Procedure Act did not apply to actions of ejectment, the proceedings in which were regulated by the Ejectment Act, which was complete in itself: *Leeson v. Higgins*, 4 Prac. Rep. 340.

*Rose*, contra, cited *Chadsey v. Ransom*, 17 C. P. 629.

MR. DALTON.—I think all the interrogatories must be allowed. I have examined the case of *Leeson v. Higgins*, but I prefer to follow the case of *Chadsey v. Ransom*, 17 C. P. 629. If the 222nd section of the Common Law Procedure Act applies to actions of ejectment, I think the right to interrogatories stands upon a foundation in no respect different.\*

*Interrogatories allowed.*

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\* See *Humphrey et al. v. Hunter*, 17 C. P. 446; *Kettlewell v. Dyson*, 16 W. R. 851; S. C., 5 C. L. J. N. S. 21.



## IN RE ROBERTS AND HOLLAND.

*Fence-viewers—Watercourses—Contiguous lots.*

To constitute a "joint interest," within the meaning of sec. 7, C. S. U. C. ch. 57, it is not necessary that the lands occupied should be contiguous lots.

The question whether such interest exists is to be determined entirely by the fence-viewers, and

Their discretion cannot be reviewed if fairly and reasonably exercised.\*

*Semble*, the absence of a demand under section 15, may be waived by the subsequent conduct of the parties.

[CHAMBERS, March 19, 1871.—WILSON, J.]

A summons was taken out on the 26th of February, 1871, calling on Robert Dale, clerk of the seventh Division Court of the County of Lambton, and John Coulter, the bailiff of the said Court, to shew cause why a writ of prohibition should not issue to prohibit the said clerk from issuing execution against the goods and chattels of Patrick Holland and Charles Holland, according to the determination of fence-viewers in a matter of dispute between James Roberts and the said Patrick Holland and Charles Holland: and why the execution of the said writ, if issued, should not be restrained, upon the ground that the clerk of the Court had no jurisdiction to issue the said execution; that the alleged award or determination of fence-viewers was void; and on grounds disclosed in affidavits and papers filed.

The proceedings shewed that on the 5th of June, 1870, Joshua Payne, a justice of the peace, summoned Patrick Holland and Charles Holland to attend, on the 11th of the month, on lot No. 27 in the 3rd concession in the township of Moore, then and there to meet three fence-viewers of the township, to shew cause why they, the said Patrick Holland and Charles Holland, refused or neglected to open up a fair portion of a regular watercourse running across the said lot.

The three fence-viewers, Peter Scott, John Maguire, and

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\* But see *Re Cameron & Kerr*, 25 U. C. R. 533; *Re McDonald & Cattanach*, 5 Prac. Rep. 288; S. C. 39 U. C. R. 432.—REF.

Thomas Boulton, on the 14th June, made their award. The award recites that they, the fence-viewers, had been summoned by James Roberts, on lot No. 28, in the 4th concession of Moore, to examine a watercourse running across the west half of lot No. 27, in the 4th concession, owned by Robert Cathcart, and also across lot 27, in the 3rd concession, owned by Patrick Holland and Charles Holland, and that they found on examining the said watercourse that "this is the proper course for the water running from James Roberts's land;" then they awarded that a ditch should be opened across the said lots—the ditch to be six feet wide on top, eighteen inches deep, and three feet wide at bottom, the earth to be kept four feet from the side of the ditch—commencing at a certain stake on the side line between lots 27 and 28, in the 4th concession, following the natural course of the water, as already marked out by the fence-viewers, measuring 320 rods from the said stake; and that the first 80 rods, next the side line, should be opened by James Roberts, the second 80 rods by Robert Cathcart, the third 80 rods by Patrick Holland, and the fourth 80 rods by Charles Holland—the whole to be finished by the 20th of August, 1870.

It was further awarded that if any of the said parties should neglect or refuse to open his share of the ditch allotted to him by the above date, any of the other parties might, after first completing his own share, open the share allotted to the party in default, and be entitled to receive not exceeding 40 cents per rod for the same from the party in default; and they awarded that all the costs of the fence-viewers should be paid by James Roberts.

On the 25th of November, 1870, Matthias Ross, Alexander Jenkins, and John Reynolds, three other fence-viewers, made an award, which—after reciting that they had been required by summons issued by G. B. Johnston, a justice of the peace, to examine a ditch in dispute on lot 27 in the 3rd concession of Moore, between Patrick and Charles Holland, complainants, and James Roberts, defendant,—

stated that they had examined the ditch in dispute, dug by award of fence-viewers, made the 14th of June, 1870, and that they could see no benefit that complainants received or could thereafter receive from the ditch, for the following reasons :

1. The ditch had been carried on an angle across the unimproved land, and nearly parallel with the main channel of the west branch of Clay Creek.

2. It had not been carried on direct to the main, most direct, or shortest channel to an outlet.

3. Had James Roberts turned easterly 138 rods from the present outlet, and at a stake put down by them (the last-named fence-viewers), and dug 50 rods, he would have had as good an outlet, and have saved 88 rods of digging in the present ditch ; both outlets are on the same creek.

They (the last-named arbitrators) therefore awarded that all expenses of digging the said ditch in dispute should be paid by James Roberts, who was forcing the ditch for his own direct benefit, and that he should also pay all expenses attending this examination and rendering this award.

On the 5th of December, 1870, Mr. Payne, the magistrate, notified Patrick and Charles Holland to attend on lot 27, in the 3rd concession of Moore, and there meet the three fence-viewers on the 10th of December, at 11, A.M., and shew cause why they refused to pay their fair portion of a ditch running on their lot, awarded by the said three fence-viewers on the 14th of June, 1870.

On the 12th of December, 1870, the first fence-viewers, Scott, Boulton, and Maguire, addressed a notice to Patrick and Charles Holland, to the effect that having been called by summons to appear on the lots of Patrick and Charles Holland to examine the outlet running through lot 27, in the 4th concession, and lot 27 in the 3rd concession of Moore, the said outlet having been awarded by them on the 14th of June, 1870, they found that James Roberts had finished the whole of the outlet according to the award—eighty rods, being his own share, and eighty rods the share of Robert

Cathcart; and that they found James Roberts had finished the shares of Patrick and Charles Holland, being 160 rods awarded to them, they being defaulters in respect to the aforesaid award.

On the 13th of December, 1870, Mr. Payne, the magistrate, sent a notice to the clerk of the seventh Division Court, to the effect that he had sent to the clerk the decision of the three fence-viewers on the ditch between James Roberts and Patrick and Charles Holland, and that the ditch was done according to their award.

Accompanying this notice was a minute of the costs of the award, amounting to \$6.68, and of the 160 rods of ditch at 40c. per rod, \$64, in all \$70.68, exclusive of bailiff's fees, for all of which it was said Patrick and Charles Holland were defaulters, and were to pay the whole expenses.

On the 17th of December, 1870, Charles Holland was served with a copy of the award and costs, and on the 19th of the same month Patrick Holland was also served.

An execution was afterwards issued by the clerk of the Division Court against the goods and chattels of Patrick and Charles Holland, and delivered to the bailiff to be executed.

Mr. Francis, a surveyor, on 29th October, 1870, certified to Patrick Holland that, in his opinion, the water had not been taken down its proper channel according to the award, but diverted from it, and that lot 28, in the fourth concession could, in his opinion, be drained cheaper and quicker than in the way proposed by the fence-viewers, and that it was not to the joint interest of the parties mentioned in the award to have the ditch made.

Charles Holland, on 30th January, 1871, made affidavit that he attended on lot 27, in the third concession of Moore, on the 10th December, 1870, at the hour named in the notice, but did not meet the fence-viewers nor any person representing them: that the award ordering the money to be paid was made on the 12th of December, and that the



ditch was not dug till the 14th of December, and was not finished up to the present time (the date of his affidavit, 30th January, 1871); and that the ditch runs about eight rods through the west hundred acres of 27, in the third concession, being that portion of the lot owned by him.

Patrick Holland, by his affidavit made on the 21st of January, 1871, said he attended the arbitrators with his witnesses, but no evidence was taken to shew the proper course of the water. Feeling aggrieved by the award made by Scott, Maguire, and Boulton, he got other three fence-viewers, Ross, Jenkins, and Reynolds, and they made their award: that the defendant's land and the land of Charles Holland are not adjacent or adjoining to the land of Roberts: that the course which Roberts wishes to take is not the natural outlet for the water: that the ditch as dug is a direct injury to defendant, as it overflows his land: that no demand was made on him to dig the ditch: and that the ditch is not according to the award of the fence-viewers.

Benjamin Milligan, John Milligan, and Charles Coyle also swore the ditch was no benefit, but an injury to the Hollands: that the ditch was not eighteen inches deep through Holland's land, nor six feet wide at the top, and the clay was not four feet from the edge: that the ditch caused a large flow of water through the lands of the Hollands, brought from the side line ditch; and that the distance from the commencement of the ditch to the boundary line of the Hollands' lands was 120 rods.

Charles Holland confirmed Patrick's affidavit.

*G. D. Boulton* shewed cause.

The award is made in accordance with the statute. The directions have all been carefully followed. The clerk of the Court was the proper person to issue the process. The merits cannot now be disputed. The fence-viewers were the proper judges of all such matters, and all that can now be done is to try whether the proceedings which are disputed were legal or illegal. He referred to C. S. U. C. c. 57, s. 7; *Siddall v. Gibson*, 17 U. C. R. 98.

*Harrison, Q.C., contra*, appeared for Patrick Holland only.

1. Patrick Holland was not an adjoining proprietor of Roberts.

2. Patrick Holland had not a joint interest with Roberts in the making of the drain.

3. No demand was made on Patrick Holland to do his work, according to secs. 14 & 15 of the Act, before the work was done.

4. It is shewn that Charles Holland appeared to the magistrate's summons, under sec. 16, requiring him to attend on the 10th of December, but the fence-viewers were not present, and so he has never refused to pay, nor been a defaulter in any form; *Murray v. Dawson*, 17 C. P. 588; 19 C. P. 314; *Dawson v. Murray*, 29 U. C. R. 464.

WILSON, J.—It appears that Roberts lives on lot 28, in the 4th concession of Moore. The drain “taps the side-line ditch dug by the municipal council through the third and fourth concessions, and from thence runs 120 rods to the boundary line of the east half of 27, in the third concession.” Robert Cathcart lives on 27, in the 4th concession, to the east of Roberts, and some one, not named, lives on 28, in the third concession, to the south of Roberts. Charles Holland's land, the west half of 27, in the third concession, is at the north-west angle, just opposite to the south-east angle of Roberts's land, which is on the other side of the line; and Patrick Holland's land, the east half of 27, in the third concession, is all the width of Charles Holland's half lot distant from Roberts's land. From these facts it is said that the following words of the Act do not apply:

Sec. 7. “Where it is the joint interest of parties resident to open a ditch or watercourse for the purpose of letting off surplus water from swamps or low miry lands, in order to enable the owners or occupiers thereof to cultivate or

improve the same, such several parties shall open a just and fair proportion of such ditch or watercourse, according to their several interests."

By sec. 8, three fence-viewers are to decide all disputes between the owners or occupants of adjoining lands, or lands so divided, or alleged to be divided as aforesaid, in regard to their respective rights and liabilities under the Act, and all disputes respecting the opening, making, or paying for ditches and watercourses under the Act.

From the facts stated, it appears Roberts desired to have the surplus water let off his land. It appears also that Cathcart, to the east, has a good deal of marshy land on his lot, and that it runs southerly upon a good deal of the north-east quarter of Patrick Holland's land. Cathcart has paid for the work done through his lot. The two Hollands have not.

It must always happen, where there are more than two lots lying the one from the other as lots in the same concession, numbering 1, 2, 3, 4, &c., that there must be some of the lots which do not touch or abut upon the other or others of them, and yet all these lots may require to be drained, or to be so grouped together as to constitute an adaptable block for the purpose of draining some one or more of them, though the others may not require the proposed drainage in any way.

The statute does not restrict the question of drainage to the owner or occupier of only the two coterminous lots, as it does when provision is made for fences.

By section 1 the enactment as to fences is—"Each of the parties occupying adjoining tracts of land shall make, keep up, and repair a just proportion of the division or line-fence on the line dividing such tracts, and equally on either side thereof," every word of which shews that provision is made for *the line-fence between the immediate occupants on each side of it*.

That enactment is very different from the language of sections 7 and 8, before quoted, and the nature of the subject required that it should be different.

In my opinion, then, the statute, with respect to the provisions which relate to drainage, does not require that the rights or duties of coterminous occupants are to be or shall be alone considered. The interests of all those who are affected by the work may and must, I should think, be jointly considered in the one reference and award.

So far, then, I have no doubt that Roberts, Cathcart, Charles Holland and Patrick Holland, each of them representing different lots, may be brought into the same project, and have their rights severally adjudicated upon in carrying out the joint or general scheme of drainage which the fence-viewers shall decide or do decide to be for their common interest, more or less, although Patrick Holland and Roberts are not as between themselves coterminous occupants.

That disposes of the first objection.

The second objection is, that Patrick Holland had not a joint interest with Roberts in the making of the drain. That is a question of fact with which I have properly nothing to do. The fence-viewers or arbitrators are to decide that. If they decided persons to be jointly interested in a work of this kind who were in no sense so interested, relief must be had in some way; I do not say by application to a Superior Court—though possibly the proceedings may be reviewable on *certiorari*,—but by action, if a case of fraud or corruption could be established.

Here it is not said they are not interested in the work from the juxtaposition of the property, but not interested because the drain made does not drain the land of the complainant, and because it has not been cut in the place where the natural flow of water is.

These are matter of detail for the fence-viewers, whose discretion I cannot supersede or control, if fairly and reasonably exercised; and I see no reason to doubt that it has been so exercised, though the complainant and some others for him deny it.

The fence-viewers are to settle what portion of the work shall be done, "according to their several interests" (sec. 7); and they are to decide all disputes between the parties



“in regard to their respective rights and liabilities,” (sec. 8); “and if it appears to the fence-viewers that the owner or occupier of any tract of land is not sufficiently interested in the opening of the ditch or watercourse to make him liable to perform any part thereof, and at the same time that it is necessary for the other party that the ditch should be continued across such tract, they may award the same to be done at the expense of such other party; and after such award, the last-mentioned party may open the ditch or watercourse across the tract at his own expense, without being a trespasser.” (Sec. 12.)

These enactments enable the fence-viewers fully and equitably to deal with all cases which are brought before them, and I cannot say they have not done so between these parties. It is not likely that Roberts would pay \$80 for doing the work he claims to be repaid for, when he can get back and has been awarded only \$64 for it, if it were not a work beneficial for himself, at any rate; and it is not likely the fence-viewers would have awarded Patrick Holland to pay the sum if they had not thought the work to be beneficial to him.

I cannot interfere on this ground.

Thirdly, it is said no demand was made on Patrick Holland to do the work through his own land before Roberts did it for him.

Roberts swears Patrick and Charles Holland “neglected and refused, up to and after the 20th of August, 1870, to do their portion of the work;” that the ditch was dug in October and November, 1870;” and both the Hollands were frequently at the ditch during the time it was being dug; and that Patrick Holland instructed the men as to the digging of the ditch.”

The statute requires a demand in writing to be served on the party to do his work, and a refusal by him before the other party can do it for him, or make him pay for it. Patrick Holland says—“I told one John Walker, one of the parties digging the ditch, not to attempt to enter upon

my lands to dig said ditch." It is quite clear, then, that Patrick Holland was determined not to allow Roberts to dig the ditch on his land, and I can quite believe, from this, that he refused to do the work, as Roberts swears.

I do not think I should, if I were quite certain of possessing the power, stop all proceedings because the demand had not been *in writing*, or even if no demand at all had been made on Patrick Holland to do the work, when it appeared he saw it done, and gave directions for the doing of it, without any objection at the time. I do not interfere, then, on this ground.

The fourth ground is, that Charles Holland swears that he attended at the time and place appointed on the 10th of December, 1870, to shew cause why he should not pay the sum demanded from him, "but did not meet the fence-viewers nor any person representing them."

Charles Holland had no one representing him on the return of the summons, though it seems he concurred and united in procuring it. That he was present is of no consequence, then, on this argument. Patrick Holland does not say he was present, or if he were, he does not say he did not meet the fence-viewers, nor does he say the fence-viewers were not present. Charles Holland himself does not say the fence-viewers were not present at the time and place. He says he "did not meet them nor any person representing them." That may have been because he would not meet them. The place of meeting is "on lot 27, in the third concession,"—rather a wide circuit. Charles lives on the west half of that lot, and he may never have left his own house, and yet have been able to make the affidavit he has made, that he *did not meet* the fence-viewers, though he may have seen them all the time they were upon the lot. He may not have met them because he was in his own house or on another part of the lot than they were upon, and yet they may have been on the lot, and he may have seen them or known of them being there all the time.

I consider his affidavit as being intentionally so worded,

in order to mislead. The difficulty has arisen, however, from the *whole* lot being specified as the place of meeting, instead of some determinate house or field, or other unmistakable locality.

As Patrick has made no affidavit on this point, I presume he did not attend, or that the fence-viewers did attend at the time and place appointed under section 16 of the Act, and that they did determine, as they say they did, that Roberts had done the work for Charles and Patrick Holland, "being 160 rods awarded to them—said Patrick and Charles Holland being defaulters to the aforesaid award."

This last objection fails also.

I must therefore discharge the summons with costs.

*Summons discharged with costs.*

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### DAMER ET AL. V. BUSBY.—BLACK V. WIGLE.

*Capias*—*Setting aside order to arrest*—*Discharge of prisoner*—*Relative powers of Court and Judge*—C. S. U. C. 22, s. 31; c. 24, s. 5.

Applications having been made to set aside two orders for arrest, with the writs and subsequent proceedings, on the ground that the affidavit to hold to bail in one case was untrue and insufficient, and in the other case was not entitled in any Court, and was insufficient in substance, and because there was a variance between the original writ and the copy served :

*Held*, 1. (following *Ellerby v. Walton et al.*, 2 P. R. 147) that the affidavit to hold to bail is not irregular, though not entitled in a Court.

2. That a Judge in Chambers has no power to set aside an order to arrest, though he may, on hearing both parties, discharge the prisoner, or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order, for irregularity in this respect.

The variance between the writ and copy was corrected by amending the former, so as to conform to the latter.

*Semble*, the Judge to whom application is made for an order to arrest, has only to be satisfied of the existence of a cause of action, &c., and an intention on the part of defendant to abscond with intent, &c. The affidavit to hold to bail may be entitled in a Court or cause, or one of them, or it may be altogether without a title; and it is sufficient to say that deponent "is informed and believes," if the source of his information be given.

The order itself can be rescinded only by the Court, but after arrest defendant may apply for his discharge on the ground of non-existence of the debt, or otherwise upon the merits, to any Judge in Chambers, or to the County Court Judge who granted the order. Such an application is not an appeal from the order to arrest, and new facts must be shewn to warrant the discharge of the prisoner, unless it be granted on account of manifest and vital defects in the original material.

Either of these orders may be discharged or varied by the Court, which possesses over the original order to hold to bail,

- (1) a general appellate jurisdiction on the identical material which was before the Judge,
- (2) an express statutory jurisdiction to rescind the order, upon a motion to discharge the prisoner.

In addition to this, the Court has also co-ordinate jurisdiction with a Judge in Chambers, or the County Court Judge who granted the first order, to discharge the prisoner upon merits appearing in the affidavits of both parties.

[CHAMBERS, May 15, 1871.—GWYNNE, J.]

### DAMER ET AL. V. BUSBY.

The defendant having been arrested and being in close custody under a writ of *capias* issued upon an order dated the 6th day of May, 1871, made by Hagarty, C. J. C. P., directing the defendant to be held to bail in the sum of \$214.90 at suit of the plaintiffs, obtained a summons from the same Chief Justice on the 10th instant, calling on the plaintiffs to shew cause why the fiat or order for the writ of *capias* issued in this cause, the said writ of *capias*, the copy and service, and the arrest of the defendant thereunder, or some or one of them, and all subsequent proceedings had by the plaintiffs herein, should not be set aside with costs as irregular and void, on the following grounds:—

1. That there were no or not sufficient facts and circumstances disclosed by the affidavits filed in support of the said order or fiat to warrant the same being made or granted, in that the same do not follow the Act of Parliament in shewing that the defendant was justly and truly indebted to the plaintiffs at the time of the making of the said affidavit.

2. That in fact the papers filed, purporting to be such affidavits, were not and are not affidavits.



3. That the same were not and are not, styled or entitled in any Court.

4. That the said fiat or order, and the præcipe for the said writ, or either of them, are not and were not styled or entitled in any Court or cause.

5. That it is not shewn by the said affidavits that the plaintiffs had good reason to believe and did verily believe that the defendant was immediately about to leave or quit Canada with intent and design to defraud them of their just debts, and the omission of the words "for money payable by the defendant to the plaintiffs" in the said affidavit, renders the same insufficient to warrant the granting the said order or fiat.

6. That it is not alleged in the said affidavits, that the plaintiffs or person or persons making the said affidavits, or either of them, had good reason to believe that the defendant was immediately about to leave Canada with intent and design to defraud the plaintiffs of a just debt, and the said affidavits filed in support of the said order or fiat are wholly insufficient to warrant the granting thereof.

7. That the paper purporting to be a copy of the said writ of *capias*, served on the defendant after his arrest, is not a true copy of the said original writ of *capias*, and in fact that the defendant was never served with a true copy of the said original writ.

8. That at the time of making the said affidavits there was no debt due by the defendant to the plaintiffs, for which he was, under any circumstances, liable to be arrested or held to bail.

9. That the affidavit of the plaintiff King, in support of the said order or fiat, does not shew his true place of abode ;

And on grounds disclosed in the affidavits and papers filed.

The application was supported by the affidavits of the defendant and of others, stating matter offered to displace matter contained in the affidavits upon which the order to hold to bail was granted, and for the purpose of establishing

that the defendant had no idea or intention of leaving Canada at all, and also for the purpose of establishing that the defendant was not indebted to the plaintiffs in any sum, upon the allegation that the goods which he had purchased from the plaintiffs were purchased on a credit which had not yet expired.

Verified copies of the affidavits upon which the order to hold to bail had been granted were filed, and also verified copies of the original writ of *capias*, and of the copy served upon the defendant.

Upon the return of the summons, the plaintiffs' attorney asked to enlarge the summons in order to answer upon affidavit the special matters contained in the affidavits filed by the defendant in support of his application. In order to dispense with this enlargement, counsel for the defendant agreed to waive all grounds of application except such as consisted in the insufficiency of the affidavits upon which the fiat was granted, and the variance between the original writ and the copy served. Upon these points only, therefore, the case was argued, the plaintiffs' attorney having, upon this suggestion of defendant's counsel, abandoned his application to enlarge the summons. The effect of the above arrangement was to exclude from consideration wholly the eighth ground of objection above stated, and all the special matters alleged in the affidavits filed by defendant.

Upon the argument it appeared that the 1st, 5th, and 6th of the above objections were identical, for the alleged defect in the affidavit stated to exist under the first objection, turned out to be that the affidavit of John Dwight King, one of the plaintiffs, alleged the defendant to be justly and truly indebted to him and his co-partners (naming them) in the sum of \$214.90 for "goods sold and delivered by me, and my said co-partners to the said Busby at his request"—whereas it was contended that the affidavit should have stated Busby to be indebted to King and his co-partners in the sum of \$214.90 "*for money payable by Busby to King and his co-partners for goods sold and delivered,*

&c., &c.; and also because the affidavit alleged that the deponent King had "*just*" reason to believe, instead of "good" reason; and that he did believe that Busby was immediately about to quit Canada, "*for the purpose of defrauding me and my co-partners as well as his other creditors of their just debts,*" instead of "*with intent and design to defraud,*" &c., &c.

The second and third objections appeared to be but one, the reason, for which it was contended under the second head that the papers filed as affidavits were not affidavits, being that they were not entitled in any Court, as stated under the third head.

The variance between the original writ and the copy thereof served, pointed at by the seventh objection, was, that in the original the plaintiffs were styled, "W. Damer, J. Damer, and J. D. King," whereas in the copy served they were styled, "William Damer, John Damer, and John D. King."

The defect or irregularity pointed at by the ninth objection appeared to be that King's affidavit ran thus:—"I, John Dwight King, of the city, in the county of York, merchant, make oath and say," there being no city named.

Mr. Ritchie (Morphy & Morphy) shewed cause.

The decision of the Judge in granting the order to arrest can only be reviewed by the Court. No single Judge can set it aside and render liable to an action of trespass those who have acted under it: *Burness v. Guiranovich*, 4 Ex. 520. If this were so, a County Court Judge, who has by C. S. U. C. cap. 24, sec. 5, concurrent powers with the Superior Court Judges, might set aside the orders of the latter, which was never intended: *Terry v. Comstock*, 6 U. C. L. J. 235; *McInnes v. Macklin*, *Ib.* 14; *Allman et ux. v. Kensel*, 3 Prac. Rep. 110.

The affidavit need not be entitled until filed with the Clerk of the Process: *Ellerby v. Walton*, 2 Prac. Rep. 147; *Molloy v. Shaw*, 6 C. L. J. N. S. 294. The word "may"

is permissive not imperative : C. S. U. C. ch. 2, sec. 18, subsec. 2. The words "money payable" are not necessary here, as the form used in the affidavit clearly shews a debt *in presenti*: *Lucas v. Goodwin*, 4 Scott 502, 3 Hodges 32.

The Court cannot enquire into the existence of a cause of action: *Brackenbury v. Needham*, 1 Dowl. 439; unless defendant shew that there is none: *Shirer v. Walker*, 2 M. & G. 917. The affidavit sufficiently shews plaintiff's place of abode; there is only one city in the county of York, and the defendant could not be misled.

*Blevins*, contra, supported the summons.

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#### BLACK V. WIGLE.

On the 20th April the defendant obtained a summons from Hagarty, C. J., C. P., calling upon the plaintiff to shew cause why the order of the Judge of the County Court of the County of Essex, bearing date the 8th day of April, 1871, the writ of *capias ad respondendum* issued thereon, and all other proceedings in the cause, should not be set aside with costs on the following grounds:—

1. That the affidavit on which the said order was made and the said writ issued, is not entitled in any Court or in the Court in which this action is brought.

2. That the said writ of *capias* issued out of the Court of Common Pleas, while the said affidavit, if entitled at all, is entitled in the Court of Queen's Bench.

3. That no cause of action against the defendant is disclosed upon the said affidavit.

4. That the said affidavit does not disclose any sufficient grounds for making the said order.

5. That the said defendant is not and was not when the affidavit was sworn, about to leave Canada.

This summons was obtained upon a verified copy of the affidavit upon which the order to hold to bail had been obtained, and several affidavits were offered to shew that the defendant has not, and in fact never had any idea or inten-



tion of leaving Canada, one of the persons making such affidavit being a person named Adams, referred to in the plaintiff's affidavit as one source of his information that defendant was immediately about to leave Canada with intent to defraud him unless he should be arrested.

The summons had been enlarged from time to time until the 11th May. On the argument the defendant's counsel abandoned the first objection as already decided, and the second also. The plaintiff, in answer to the defendant's affidavits, filed several affidavits, for the purpose of shewing that the defendant's intention was and still is to leave Canada with intent and design, if he can, thereby to defeat the plaintiff's recovery in this action, and explaining away the effect of Adams's affidavit, and tending to establish that the plaintiff had good reason to believe, and that there was good reason to believe that the defendant would have absconded if not arrested.

It appeared that the defendant was not in close custody, but that he had given bail to the sheriff.

The defendant's counsel rested his argument chiefly upon the alleged defect in the affidavit to hold to bail, in not disclosing, as he contended, a sufficient cause of action. The point of the objection was, that although the affidavit alleged positively that the defendant had seduced the plaintiff's daughter, and that on the 30th day of March, his daughter, only sixteen years of age, was delivered of a child, whereby plaintiff had lost and was deprived of her services, and had incurred expenses in and about nursing his said daughter, and in and about the delivery of her said child, and that the plaintiff has a good cause of action against the said Alexander Wigle, the younger, of over one hundred dollars, to wit, \$2,000, *in respect of such loss of services and expenses aforesaid*; yet the affidavit did not allege that Alexander Wigle, the younger, was the father of the child of which plaintiff's daughter had been delivered, and for the absence of this allegation it was contended that the affidavit disclosed no cause of action.

*Spencer* shewed cause.

The omission of the Court from the title of the affidavit is not an irregularity : *Ellerby v. Walton*, 2 Prac. Rep. 147 ; *Molloy v. Shaw*, 6 C. L. J. N. S. 294. Even if it were, the objection being merely technical, leave would be given to amend : *McGuffin v. Cline*, 4 Prac. Rep. 134 ; *Cunliffe v. Maltass*, 7 C. B. 701 ; and this notwithstanding the proceedings are by way of arrest : *Swift v. Jones*, 6 U. C. L. J. 63 ; *Fownes v. Stokes*, 4 Dowl. 125 ; *Primrose v. Baddeley*, 2 Dowl. 350 ; *Sugars v. Concanen*, 5 M. & W. 30.

If the arrest is set aside on this ground, leave should be given to re-arrest ; *Perse v. Browning*, 1 M. & W. 362 ; *Talbot v. Bulkeley*, 16 M. & W. 193.

As to the second objection, that the cause is in the C. P., while the affidavit to hold to bail is sworn before "a Commissioner in B. R.," see Con. Stat. U. C. ch. 39, secs. 1, 6 and 8. The words of the affidavit sufficiently disclose a cause of action, and the decision of the Judge who granted the order cannot be reviewed here ; *McGuffin v. Cline*, *ubi supra* ; *Terry v. Comstock*, 6 U. C. L. J. 235 ; *Palmer v. Rodgers*, *ib.* 188 ; *Hargreaves v. Hayes*, 5 E. & B. 272 ; *Runciman v. Armstrong*, 2 U. C. L. J. N. S. 165.

*Osler*, contra, supported the summons.

May 15.—Judgment in both cases was now delivered by GWYNNE, J.—In *Hopkins v. Salembier*, 5 M. & W. 423, A. D, 1839, the application was made to the full Court, and it was for a rule to shew cause why the *capias* should not be set aside, and the bail bond given up be cancelled, on the ground that the affidavits were insufficient, and also upon affidavits denying that the defendant was about to leave the country. The rule was discharged upon the sole ground that the rule *nisi* should have asked to set aside or rescind the Judge's order, and not to set aside the *capias* ; for if that should be set aside the sheriff would be made a trespasser ; and the Court held that where the application is rested upon the insufficiency of the affidavits upon which

the Judge's order to hold to bail is made, it should be to set aside the order.

In *Sugars v. Concanen*, 5 M. & W. 30, A. D. 1839, the application was to the Court, and the form of the rule *nisi* was to shew cause why the bail bond executed by the defendant should not be delivered up to be cancelled, on his entering a common appearance, upon the ground of an irregularity in the copy of the *capias* served, which stated the writ to be returnable within four calendar months instead of one; but the rule was discharged, the Court intimating that applications grounded on irregularities ought to be made within the time for putting in bail, which that application had not been.

In *Walker v. Lumb*, 9 Dowl. 131, A. D. 1840, the application was to the Practice Court, and the rule *nisi* was to set aside the Judge's order for arresting the defendant, upon affidavits meeting the affidavit upon which the order had been granted, as to the intention of the defendant to leave the kingdom, and denying that he had any such intention, and shewing that he applied moneys realized from a sale of goods towards payment of his creditors. That was held to be an application on the merits and not for irregularity, and that therefore the application was not too late, although made after the expiration of the time for putting in bail. The case of *Sugars v. Concanen* upon points of irregularity was approved, and the Court adopted the language of Mr. Lush, in his Practice, viz., that "when the complaint is founded on an irregularity, the application must, as before, be made within the time allowed for putting in bail, and before any fresh step with regard to these proceedings has been taken; but where it is founded on a material defect in, or, as it would seem, on the falsity of the affidavit, the defendant may *perhaps* apply at any time while the suit is pending." The rule in that case was made absolute, because the order had been granted on the ground of an assertion attributed to the plaintiff, to the effect that he intended leaving the kingdom when he should

sell certain machinery; and the defendant upon affidavit fully met this, not only denying that he had any intention of leaving the kingdom, but shewing that he had sold the goods, and had applied the proceeds in paying his creditors, and the plaintiff offered no affidavits in reply to this affidavit.

In *Schletter v. Cohen*, 7 M. & W. 389, A. D. 1841, the application was to rescind an order of Rolfe, B., directing the issue of a *capias* for arrest of defendant, upon the ground of an alleged defect in the affidavit to hold to bail, viz., that the affidavit, which was made before the suing out of a writ of summons, was *not* entitled in the cause, but the Court held this to be no defect.

In *Needham v. Bristowe*, 4 M. & Gr. 262, A. D. 1842, the application was to the full Court, having been referred there by Wightman, J., from Chambers, but for what reason does not appear. The form of the rule *nisi* was to shew cause why an order made by Lord Denman, C. J., at Chambers, dated 15th March, for holding the defendant to bail, should not be set aside, why the writ of *capias* issued in pursuance of the same should not be set aside for irregularity, and why the bail bond should not be given up to be cancelled. The irregularity complained of in the *capias* was in the endorsement thereon, which was issued by the plaintiff in person, wherein he described himself as "of the Fleet Prison, in the parish of St. Bride, in the city of London." It was held that this was no irregularity, so that the objection to the *capias* failed. The decision in effect was, that as to setting aside the Judge's order the application was in the nature of an appeal, and that the Court could give no judgment upon that point in favour of the applicant, as he had failed to bring before the Court the materials used in Chambers, and upon which that order had been made; but as to setting aside the bail bond, the application might be entertained under the 6th section of the Act, as a motion to discharge the prisoner. Tindal, C.J., says, "although the defendant in this case may not be in a condition to set aside the order, he may be entitled to insist on his discharge



under the 6th section of the Imprisonment for Debt Act, (1 & 2 Vic. c. 110). *The proper form of the rule in that case would be to call on the plaintiff* to shew cause why the defendant should not be discharged out of custody, or why the bail bond should not be delivered up to be cancelled; but we can decide that now." To this counsel replied, "the only authority the Court has under that section, is to discharge the defendant out of custody, but there is no such application in this case." To which Tindal, C.J., replied, that he thought the rule might be made absolute *for cancelling* the bail bond, on the merits disclosed in the affidavits.

In *Gibbons v. Spalding*, 11 M. & W. 173, A. D. 1843, it was decided by the full Court that an order for the arrest of defendant under 1 & 2 Vic. ch. 110, sec. 3, may be made on an affidavit of the plaintiff *that he has been informed and believes* that the defendant is about to leave England, provided it state the name and description of the person from whom he received such information. Parke, B., says, "it is every day's practice to make orders on such evidence. There is, however," he says, "this limitation to hearsay evidence, that no Judge ought to make an order of this description merely upon the plaintiff's swearing that he is informed and believes that the defendant is about to leave the country. The plaintiff should be required to state in his affidavit the name of the person giving him that information. The Judge then has before him information which the defendant has the means afterwards of explaining or denying, and if he can do so he will of course be discharged." In that case Gurney, B., had made the order for holding the defendant to bail. An application was subsequently made to him in Chambers, under and in the terms of the 6th section of the Act, "*for the discharge of the defendant,*" but that summons was discharged. The application to the Court was for a rule to rescind the above orders on the ground of the insufficiency of the affidavit upon which the order to hold to bail was made. The rule

*nisi* was refused upon this ground, but was granted on the merits appearing in affidavits filed in Chambers upon the application *for the discharge of the defendant*. The form of the rule would seem to have been to shew cause why the defendant should not be discharged, and the order in Chambers refusing that discharge rescinded. Fresh affidavits, which had not been used in Chambers upon that application, being offered on behalf of the plaintiff on shewing cause to the rule, Thesiger interposed, and contended that fresh affidavits could not be read, "inasmuch as the present application was merely in the nature of an appeal from the decision of the learned Judge under the 6th section of the Act," but the Attorney-General, *contra*, insisted that the admission of fresh affidavits was altogether for the discretion of the Court: that they might have been used "if *the defendant had applied to the Court instead of to a Judge at Chambers for his discharge*, and therefore that they would properly be admitted in the present case;" and Parke, B., says "the party who seeks to detain the defendant in custody is certainly at liberty to use other affidavits than those which were brought under the consideration of the Judge;" and Alderson, B., says, "I entertain no doubt that both parties are at liberty to use fresh affidavits. The object of the Court must be to ascertain all the facts correctly, that they may determine on satisfactory grounds whether the Judge's order is to be set aside or not."

In *Heath v. Nesbitt*, 2 Dowl. N.S. 1041, A.D. 1843, the form of the rule was to shew cause why two orders of Gurney, B., one directing defendant's arrest under 1 & 2 Vic. ch. 110, and the other refusing his discharge, *should not be rescinded, and the defendant discharged out of custody*. The rule had been obtained upon fresh affidavits, and those which had been used in Chambers in support of the application for the defendant's discharge were not brought before the Court. Hereupon Watson contended that "as the present application was in the nature of an

appeal from the decision of the Judge, the affidavits used before him should be brought before the Court, in order that they might see whether or no the Judge's discretion had been properly exercised," and it was held by the whole Court, consisting of Lord Abinger, C. B., Parke, Gurney, and Rolfe, BB., that although additional affidavits may be used (as decided in *Gibbons v. Spalding*), still that those upon which the learned Judge *refused to discharge* the defendant should also be before the Court, for otherwise it would be impossible to determine whether he had decided correctly or not *in refusing the discharge*.

In *Graham v. Sandrinelli*, 16 M. & W. 191, A. D. 1846, the form of the rule which was granted by the Court was simply *to shew cause why the defendant should not be discharged out of the custody of the sheriffs of Middlesex*. The defendant had been arrested under an order of Erle, J. Upon being arrested, the defendant, on affidavits of himself and other persons that he intended to remain in England, applied to Platt, B., to set aside the order of Erle, J., and all subsequent proceedings. The learned Judge refused to make any order, whereupon the application was made to the Court as above, and was supported by further affidavits besides those used in Chambers. Martin, in shewing cause to the rule, contended that it was incorrect in point of form; that it ought to have been a rule to set aside the order of Platt, B., not merely a rule to discharge the defendant; that under section 6 of the Act, the proper course was for the party arrested to apply in the first instance to a Judge, or to the Court, for an order or rule on the plaintiff to shew cause why he should not be discharged out of custody; that in substance that was the application made to Platt, B., who in effect made an order refusing to discharge the defendant, and that then the subsequent jurisdiction of the Court is only to discharge or vary such order made by a Judge, on application made to the Court by a party dissatisfied with the order; that the defendant, according to the true construction of the 6th

section, can appeal at once ; that he may under that section apply to another Judge, or he may come to the Court at once, but that he cannot do both. On the other hand, it was contended that wherever authority is given to a Judge at Chambers, it is impliedly given subject to the exercise of it being reviewed by the Court, and that the Court out of which process issued had always a right, by virtue of their general jurisdiction, to relieve the party against it, if they thought the Judge had allowed the process to issue upon insufficient materials, or had exercised an improper discretion in doing so.

In giving the judgment of the Court, Parke, B. says, "It is clear from the terms of this (6th) section that notwithstanding the Judge's order to arrest, the Court from which the process issued, upon an application to it, has a power to discharge ; and we think there is nothing in the Act to take away the general control previously possessed by the Court over a single Judge, if we think the materials before the Judge insufficient, or that he exercised an improper discretion acting in any matters pending in the Court ; and consequently where an application is made to us we may interfere, either by virtue of our general jurisdiction, or that given by the statute ; and further, the party arrested may, by the statute, use affidavits to contradict or explain those on which the order was granted, either by denying the intention to depart, or shewing that the debt was not due, a course which was not permitted by the old practice of the Court ; and those affidavits may be answered by the plaintiff on shewing cause. *In addition to this*, a right is given to the person arrested to take the opinion of another Judge *as to the propriety of his discharge*, this opinion being again subject to be reviewed by the Court above."

He proceeds to say : "Two questions here arise—first, whether, if the Judge secondly applied to should differ from the first on the same state of facts, he has *power* or *right* to order the prisoner's discharge as upon an appeal to



the Court; and, secondly, whether, if it should appear on the fresh affidavits that the person arrested was about to quit England at the time the *affidavits* were made, though it is not clear that he was, or even though it be shewn that he was not, when the *order* was made, the Court ought to discharge him or his bail, or direct money deposited instead of bail to be refunded. *We are not all agreed upon the questions*, and it is not now necessary for us to decide them, though the points are of practical importance." With reference to the proceedings before Platt, B., the judgment proceeds: "After the defendant was arrested, he applied to my brother Platt to set aside the order to hold to bail, and all subsequent proceedings, upon his own affidavit and the affidavits of other persons as to his intention to remain in England. The learned Judge refused to make the order. The affidavits did not disclose any new matter against the defendant. *In the form in which the summons was taken out*, my brother Platt was certainly right in not granting an order to the full extent asked, because the writ of *ca. sa.* certainly ought not to have been set aside. Whether he was right or not in refusing to *make an order to discharge only, on this summons*, is not material now, for we are all of opinion that we may consider that my brother Erle's order and the affidavit in support of it are before the Court, and that under our *general* jurisdiction we have a power to give the defendant relief. We all think he was wrong in making the order to arrest upon such an affidavit. The order, therefore, having proceeded on insufficient grounds, we think that the defendant should be discharged out of custody, *and we may say nothing respecting the order of Baron Platt.*" The defect in the affidavit was that the plaintiff swore that he was informed and believed that the defendant was about to leave England, without stating [from whom the deponent obtained the information.

\* *Talbot v. Bulkeley*, 16 M. & W. 193, was before the Court at the same time as *Graham v. Sandrinelli*. The

rule was to shew cause why an order of Pollock, C.B., dated 11th August, 1846, should not be rescinded, and why the *capias* issued in pursuance thereof should not be set aside, and why the sum of £126 18s., deposited by the defendant with the Sheriff of Middlesex in lieu of special bail, should not be returned. The affidavit upon which the order for defendant's arrest had been made was objectionable upon the same ground as that in *Graham v. Sandrinelli*. After defendant's arrest he applied to the Chief Baron *for his discharge*, upon an affidavit negating his intention to leave England, His Lordship refused to make any order, and thereupon the defendant lodged £126 18s. in lieu of special bail.

On the part of the plaintiff, in answer to the rule, it was sworn that on the 7th November, the deponent called at defendant's lodgings, and was informed by a female servant there that his goods had been distrained upon for rent on the 20th of October, and that on that day he had given up his apartments, and left for the purpose of going to France, and had never been there since that time. It was contended upon this affidavit that it shewed sufficiently reasonable ground to apprehend that the defendant would go abroad and defeat the plaintiff of his debt if he should be relieved from the effect of the Lord Chief Baron's order, or indeed that he had already gone, and that, this being so, the Court would not set the order aside, or direct a return of the deposit. It was contended in answer that the original affidavit upon which the arrest took place was clearly insufficient, and that therefore the question was, whether it sufficiently appeared that, *when the defendant was arrested*, he had any intention of going abroad; that at all events the question must be determined with reference to the period when the original order was confirmed by the Chief Baron on the 17th August; and that subsequent facts ought not to be taken into consideration, except in so far as they might shew that the defendant at that time intended to go abroad. In reply to this contention, Rolfe, B., says:

—“I very much doubt whether the question is whether he intended to go abroad at the time of the actual arrest. The Judge may issue a *capias* at any time during the progress of the cause *toties quoties*, and if the Court be satisfied that the defendant *now* intends to go abroad, it would be absurd to discharge this order, merely to substitute another of the present date.” And in giving judgment the Court say, “We have carefully perused all the affidavits, and think that if it were not for the matter disclosed on the affidavits used on shewing cause, the defendant would be entitled to have the deposit returned, but those affidavits raise a question on which the defendant has not had any opportunity of being heard, viz., whether he has not since the arrest broken up his establishment and gone to reside abroad, and whether this be the fact the Court wish to ascertain, before they decide on the question whether the deposit ought to be returned;” and that question was therefore referred to the Master.

In *Pegler v. Hislop*, 1 Ex. 437, A. D. 1847, the form of the rule was to shew cause why an order of Williams, J., for the arrest of the defendant, and under which he had been arrested, and had given bail to the sheriff, should not be rescinded, and why the bail bond should not be given up to be cancelled. The affidavits in support of the rule denied the existence of the debt, and also that the defendant was about to quit England for a period of two months. It being objected that the question of the existence of the debt could not be gone into, and that the only point open was as to the intention of the defendant to quit England, Parke, B. says:—“I think the words of the statute leave the whole matter at large, and the defendant is not precluded from disputing, at this stage of the proceedings, either the cause of action or other matters which the plaintiff’s affidavits contain. It must, however, be a very clear case that the plaintiff had no cause of action, or we should not interfere.” The decision in the case was, that as the Court was of opinion that the intention of the defendant to go abroad was not made out, *the bail bond should be cancelled*, but the

judge's order and the *capias* were left undisturbed. That was a decision of the full Court, consisting of Pollock, C. B., and Parke, Alderson, and Rolfe, B.B.

In *Burness v. Guiranovich*, 4 Ex. 520, A. D. 1849, Lush obtained a rule in full Court; calling upon the defendant to shew cause why so much of an order of Talfourd, J., of the 15th September, as set aside a former order made by the same learned Judge on the 1st of September, should not be rescinded. On the 1st September, an order had been made for the arrest of the defendant. After the arrest a further application was made to the same Judge upon additional facts, and he made the order of the 15th September, as follows:—"I order that my order to hold the defendant to bail, dated the 1st day of September instant, and all subsequent proceedings, be set aside with costs to be taxed, and the defendant be discharged out of the custody of the sheriff of the city and county of Bristol." On the argument it was contended that the Judge, upon the occasion of the second order, had exercised his discretion, and the Court ought not, therefore, to interfere by setting the second order aside. To this, Parke, B., says:—"The defendant still may have his remedy by an action on the case," and Alderson, B., says:—"The statute (1 & 2 Vic., ch. 110) says *nothing about setting aside the writ: the proper course is to order the discharge of the party out of custody.* The order of the learned Judge cannot be revoked. *Can the defendant shew any instance of such an order being revoked?*" The learned Baron here plainly refers to the first order as the one which was revoked, but which he considered could not be. Counsel replied that "where an order has been obtained by fraud, the learned Judge may revoke it by reason of his general jurisdiction *quia improvide emanavit*," to which Alderson, B., answers, "As long as the order exists, the person who obtained is not a trespasser. *If the party has obtained the order by fraud*, the other party has a remedy against him by an action upon the case," and the judgment of the Court is given in these words, "*the proper*



*course was to apply to discharge the defendant out of custody. The rule must be made absolute to set aside the order of the 15th September so far as it relates to rescinding the order of the 1st of September."*

In *Cunliffe v. Maltass*, 7 C. B. 695, A. D. 1849, an order to hold the defendant to bail in the sum of £1,050 had been made by Patteson, J. Upon the defendant being arrested, he applied to the same Judge under the 6th section of the Act, and obtained a summons calling upon the plaintiff to *shew cause why he should not be discharged out of custody*, upon the ground that the affidavit to hold to bail, which stated several causes of action, was defective as to the statement of one for £500, which, constituted part of the £1,050. The learned Judge being of opinion that this cause of action for £500 was defectively stated, declined to discharge the defendant, but made an order reducing the amount for which the defendant should be held to bail to £550. The defendant afterwards perfected special bail for the lesser amount, namely, £550, and applied to the full Court for and obtained a rule calling upon the plaintiff to *shew cause why the two orders of Patteson, J., should not be rescinded, why the writ of capias issued in pursuance of the first order should not be set aside, and why the recognizance of the defendant's special bail put in and perfected should not be vacated, or why an exoneretur should not be entered on the bail piece on the defendant's entering a common appearance.* Wilde, C. J., in giving judgment in that case, after stating the facts, including the application made by defendant for his discharge after arrest, says:—"I apprehend that the defendant is not now in a situation to make an application different from that which he made before the Judge at Chambers. The motion is founded on the 6th section of the statute, which enacts that 'that it shall be lawful for any person arrested upon a *capias* to apply at any time after such arrest to a Judge of one of the Superior Courts at Westminster, or to the Court in which the action shall have commenced, for an order or rule on the plaintiff

in such action to shew cause why such persons arrested should not be discharged out of custody; and it shall be lawful for such Judge or Court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such order therein as to such Judge or Court shall seem fit; provided that any such order made by a Judge may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order.' When, therefore, the parties come before the Court, the Court is to make such order as it conceives the justice of the case to require. Now, justice requires that we should deal with the case as it was presented before the Judge." Coltman, J., says:—"By the 3rd section of the Act, two matters are referred to the Judge—the one, whether the plaintiff has a cause of action against the defendant to the amount of £20, or has sustained damage to that amount; the other, whether there is probable cause for believing that the defendant is about to quit England. When the Judge makes an order to hold the defendant to bail for a particular amount, *he is doing a judicial act*. The question is, what is the mode of relief where the Judge has directed a defendant to be held to bail for a larger sum than is warranted by the affidavit? The remedy is pointed out by the 6th section, which provides that *any order* made by a Judge may be *discharged or varied by the Court* on application made thereto.

In *Gadsden v. McLean*, 9 C. B. 283, A. D. 1850, the application was to the full Court, and the form of the rule was to shew cause why the Judge's order to hold the defendant to bail, and the *capias* issued in pursuance thereof, should not be set aside, and why the bail bond should not be delivered up to be cancelled, on the ground that the affidavit to hold to bail disclosed no cause of action. Wilde, C. J., in giving judgment says:—"The Court is of opinion that the affidavit upon which the order for the *capias* in this case issued does not disclose any good cause of action. Upon the whole we think that remedy enough will be given

to the defendant by ordering the bail bond to be delivered up to be cancelled without costs."

In *Bullock v. Jenkins*, 20 L. J. Q. B. 90, A. D. 1850, the application was to the Bail Court, and the form of the rule was to shew cause why an order of Platt, B., to hold the defendant to bail, should not be rescinded, or why the defendant should not be discharged out of custody. After having been arrested, the defendant, upon affidavits that he had no intention of leaving the country, applied to Platt, B., for his discharge. It was contended that the defendant, having applied to Platt, B., for his discharge, was not entitled to come to the Court by way of appeal from his decision. Patteson, J., in giving judgment, says:—"The application is divided into two parts; the granting or refusing the first part must depend upon whether the order was rightly made in the first instance, and that again will depend upon whether the affidavit upon which it was founded was sufficient to justify the learned Judge in making the order. I take it to be quite clear, that on a motion to set aside an order of a Judge warranting an arrest of a party, it is not competent for the party making the application to produce affidavits as to collateral facts not submitted to the notice of the Judge. In considering, then, whether the order of Platt, B., ought to be set aside, I must confine myself to looking at the affidavit on which the order was made." After reviewing the affidavit the first part of the rule was discharged. He then proceeds:—"Then as to the second part of the application, which is for the discharge of the defendant out of custody, it appears *that an application to discharge the defendant* had been made to the learned Judge, but that the latter had refused it. It is competent nevertheless for the defendant to come to this Court and ask for his discharge. The application is not by way of appeal, but is a substantive application, and therefore new facts may be introduced." Now this case seems to warrant the conclusion that the application to a Judge which the 6th section of the Act authorizes to be made *after the arrest*, is not by

way of appeal from the order authorizing the arrest. It may be made to the same Judge as the one who ordered the arrest, or to any other Judge, and if by way of appeal no new matter could be introduced; and moreover the decision of the Judge made under the 6th section does not exclude an *appeal* to the Court against the *first* order to hold to bail, without taking any notice of the order of the Judge to whom the application had been made after the arrest.

In *Hargreaves v. Hayes*, 5 El. & B. 272, the application was to the full Court, and the form of the rule asked was to set aside the order of Erle, J., directing the defendant to be held to bail. The grounds of the motion were alleged defects in the affidavit to hold to bail. The Court there sustained the order, notwithstanding the objections, and refused to grant a rule, holding that the affidavit to hold to bail was sufficient, which alleged that the defendant was indebted to the plaintiff in a stated sum for railway shares "sold" by deponent to him without adding "and delivered," and that the entitling the affidavit in a Court, and with a style of cause, although made before writ of summons issued, did not vitiate the affidavit.

In *Stammers v. Hughes*, 18 C. B. 527, A. D. 1865, the plaintiff had most grossly imposed upon a Judge by swearing that the defendant was indebted to him in £63, and had thereby obtained an order to hold the defendant to bail, and, upon arrest, the defendant, being about to sail for America, deposited with the sheriff the full amount of the alleged debt. Afterwards upon affidavits denying the existence of the debt, and shewing the contract, by which it appeared that no debt or claim did or could be alleged to exist against the defendant, and although the plaintiff's claim was so utterly devoid of foundation as to induce the learned Judge to characterize his conduct in swearing to the debt, and thereby obtaining the order for arrest and the *capias*, as a gross abuse of the process of the Court; and another learned Judge to declare that he had no hesitation in saying "that the plaintiff had not a shadow of claim;" and another that



“the plaintiff’s claim is wholly unfounded;” still the form of the rule was merely calling upon the plaintiff to shew cause *why the money deposited with the sheriff should not be restored to the defendant.*

In *Stein v. Valkenhuysen*, El. Bl. & El. 65, A. D. 1858, the form of the rule is not precisely stated, but as the whole proceeding was a gross abuse of the process of the Court, the order, *capias*, and arrest, all appear to have been set aside.

In *Burns v. Chapman*, 5 C. B. N. S. 481, an order to hold the defendant to bail was made by Hill, J., on the 8th October, 1868. After the defendant was arrested under a *capias* issued upon that order, and had deposited the amount sworn to with the sheriff, and £10 in lieu of bail, he made an application upon affidavits to the same Judge for and obtained a summons, the form of which, as appears by the report, was, calling upon the plaintiff *to shew cause why the order of the 8th October should not be rescinded.* The summons was opposed upon affidavits, and the learned Judge refused to make any order, but whether he so refused for the reason of the form of the summons, or on the merits, does not appear. On the first day of the following term a motion was made to the Court for a rule to shew cause why the order of the 8th October should not be rescinded, and the writ of *capias* issued thereunder set aside, and why the money paid in lieu of bail should not be repaid to the defendant. The rule was moved upon two grounds: first, that the affidavit upon which the order for the writ of *capias* was obtained contained a statement of a cause of action, which, when the circumstances came to be investigated, the plaintiff could not sustain; secondly, that the Court of Common Bench had no jurisdiction over the subject matter of the action. The Court refused to grant any rule. As to the first point, Cockburn, C.J., giving judgment, says:—“All that is required under the statute, 1 & 2 Vic. ch. 110, is, that *the Judge should be satisfied, that there is a cause of action.*

I entertain a strong opinion, *that if the Judge be satisfied* that a cause of action exists, it is not for him to enquire into the particular form of the action; and even if it should appear to him that the plaintiff is about to pursue a mistaken or erroneous course of procedure, I think it is no part of the Judge's duty to entertain that question. *If satisfied* that the plaintiff has a cause of action, all he has to do is, to afford him the remedy pointed out by the statute. Of course the Court will not stand by and see its process abused. It was upon that principle that this Court proceeded in *Stammers v. Hughes*. *Being satisfied that there was no cause of action* at all, and that its process was being abused for the purpose of oppressing and harassing the defendant, the Court thought fit to interfere for her protection. So, here, if the Court were satisfied that this action was causelessly brought, and the arrest of the defendant vexatious, and an abuse of its process, it would not be slow to interfere to prevent injustice." And Williams, J., says:—"I entirely concur in what has fallen from my Lord. All I wish to add is, that in refusing this rule we are not in any degree departing from the principle upon which this Court acted in *Stammers v. Hughes*. *The Court will not interfere unless it clearly appears that the plaintiff has no cause of action, and that he is using the process of the Court for the purpose of oppression and annoyance.*"

In *Barker v. Lingholt*, 11 W. R., Q. B., 68, it appeared that on the 23rd September, 1862, the defendant had been arrested. On the 26th September, defendant applied to Bramwell, B., upon affidavits, for his discharge. The learned Baron refused to discharge the defendant. On October 23rd, he again applied for his discharge to Mellor, J., upon a further affidavit. Upon this application the learned Judge discharged defendant, but the plaintiff forthwith obtained from him another order for defendant's arrest, founded upon another affidavit. The defendant being again arrested, applied *for his discharge* to the Court in term,

upon affidavits setting forth all the above proceedings. The application was made partly on the ground of the double arrest, and partly on account of inconsistency in the affidavits and their unsatisfactory character. The defendant in his affidavits denied the cause of action, and it was contended for him that he could controvert the debt, and that the Court or a Judge has a discretion on the whole of the circumstances. To this, Cockburn, C. J., says:—"Not a general discretion—supposing a *prima facie* case is made on which the Judge or the Court is satisfied that there is a cause of action, that is, a real *bond fide* question to be tried. No doubt if it be clear that there is not, then he cannot be satisfied that there is a cause of action so far as to allow of the arrest. In giving judgment, he says: "The cause of action must no doubt be shewn to the satisfaction of the Judge, but it is so shewn when it is sworn to in an affidavit of the plaintiff, and there are only, on the other side, affidavits which leave the question in doubt. That is so here. It is left doubtful by the defendant whether there is or is not a cause of action [the question depended upon what the foreign law was, which governed the case, as to which there was no clear evidence]; but it is positively sworn to by the plaintiff. There is not enough to shew any wilful abuse of the process of the Court, or any wilful falsehood in the affidavits." The Court refused to discharge the prisoner, but the defendant's counsel being satisfied with the reduction of the amount of bail, and the plaintiff not resisting, the rule was made for reduction of bail.

In *Delisle v. Legrand et al.*, 6 U. C. L. J. 12, before Draper, C. J., in Chambers, the form of the summons was to set aside the order of the County Judge of the County of Essex for defendants' arrest, and the writ of *capias*, with costs, and to discharge defendants from custody, on the ground that the affidavit to hold to bail was insufficient, inasmuch as the plaintiff had no cause of action to the amount of £55, and because the facts and circumstances

to satisfy the Judge that there was good and probable cause to believe that the defendants, unless forthwith apprehended, were about to leave Canada with intent to defraud the plaintiffs, were untrue. The learned Chief Justice, upon the authority of *Stammers v. Hughes*, 18 C. B. 52, entertained the question as to the existence of the debt, and the intention to quit Canada with intent, &c., upon affidavits filed by defendants and others filed in answer thereto, and, notwithstanding the form of the summons, nothing in fact turned upon any defect or insufficiency in the affidavits to hold to bail, but the case proceeded wholly upon new matter, and the summons was discharged.

In *Terry v. Comstock*, 6 U. C. L. J. 235, before Draper, C. J., the summons called upon the plaintiff to shew cause why the writ of *capias* issued in the cause, the arrest of the defendant thereunder, and all proceedings subsequent thereto, should not be set aside, on the ground that both the plaintiff and defendant were at the time of the issue of the writ citizens of a foreign country; or why the arrest should not be set aside, *and the defendant altogether discharged from custody*, on the ground that the defendant had not, either at the time of the making of the affidavit to arrest, the issue of the writ of *capias* thereon, or the arrest of the defendant thereunder, any intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose. Draper, C. J., in giving judgment, says:—"In this application to set aside the defendant's arrest, and discharge him from custody, the only point for decision raised is, that the defendant had not, at the time of the granting the order, the issuing of the *capias*, or the making of the arrest, any intention of quitting the Province of Canada with intent to defraud. *It was not pressed upon me to review the decision of the learned Judge who made the order for the arrest, upon any suggestion of the insufficiency of the affidavit before him to sustain such an order.* The application was based entirely on the new matter disclosed upon affidavits.



*Had the former course been taken I should have referred the matter to the full Court."*

In *McInnes v. Macklin*, 6 U. C. L. J. 14, the application was by summons to shew cause *why the defendant should not be discharged from custody* and the bail bond be cancelled "on the ground that the affidavit on which the order had been obtained did not disclose the name of the party from whom the plaintiff received the information that defendant was going to New Caledonia, *and upon grounds disclosed in affidavits and papers filed.*" These affidavits, which were very numerous, were offered for the purpose of shewing the dealings between the parties, and that, although defendant was going from Canada, it was but for a short time on business, and that he was leaving his family here, and negating all intention to defraud. Hagarty, J., after referring to these affidavits, and to *Graham v. Sandrinelli*, and the points there stated as undecided, says:—"It is not necessary further to discuss the question of my jurisdiction in Chambers, as I dispose of this case upon my view of the merits."

In *Swift v. Jones*, 6 U. C. L. J. 63, the application was in Chambers for a summons to shew cause why the order of the Judge of the County Court of the County of Brant, the writ of *capias* issued thereon, the copy and service thereof, and the arrest of the defendant under the said writ, should not be set aside with costs, for (among several grounds stated), the following, which was the only one held to be tenable, namely—that the writ was issued out of the Court of Common Pleas, and one of the affidavits on which it was issued was entitled in the Court of Queen's Bench. Richards, J., giving judgment in that case, says:—"The case cited from 5 E. & B. 272 (*Hargreaves v. Hayes*) seems to me to be a strong one in favor of the plaintiff, and there would always be great reluctance to set aside the order of a Judge directing the arrest, when there are strong grounds from which he might draw the conclusion that the defendant was about to leave the Province of Canada. At all events I

am not prepared, *even if I had the authority so to do*, to set aside the arrest on the ground that the learned Judge of the County Court ought not to have ordered it, from the insufficiency of the affidavits placed before him." The learned Judge, however, was of opinion that the not having the head of "In the Queen's Bench" erased when the affidavit was filed in the Common Pleas, and the title of the Court of Common Pleas inserted, was the act of the plaintiff and an irregularity, and for that reason he set aside the arrest. He says:—"One of the affidavits here is entitled in the Court of Queen's Bench and the other is not entitled at all. It may be argued that the affidavit might now be entitled, which has a blank for that purpose; but that would not get over the difficulty as to the other, and *both* affidavits are necessary to justify the arrest. I have seen no case which goes so far as to decide that a plaintiff is not guilty of an irregularity when he entitles his affidavit in one Court, and uses it in another. I think, independently of the question of irregularity in using the affidavit entitled in one Court for the purpose of issuing bailable process out of another, that our statute was intended to provide expressly for the mode in which affidavits to hold to bail were to be sworn and entitled when used in either of the Courts. The plaintiff, not having followed that course, is, I think, clearly irregular in his proceeding." I would infer from the same learned Judge's decision in *Molloy v. Shaw*, 6 C. L. J. N. S. 294, that he would not have made use of his language if *Ellerby v. Walton*, 2 Prac. Rep. 147, which was a decision of the full Court, had been cited, and which in *Molloy v. Shaw* he followed. It is singular that neither in *Swift v. Jones* nor in *Allman et ux. v. Kensel*, 3 Prac. Rep. 110, nor in *Palmer v. Rodgers*, 6 U. C. L. J. 188, was *Ellerby v. Walton* cited.

In *Allman et ux. v. Kensel*, the application was in Chambers to *set aside* the order for the defendant's arrest made by the County Judge of Essex, with the writ and

arrest, on various grounds, viz., the insufficiency of statement of any good cause of action, and the absence of any facts indicative of an immediate departure from Canada, the absence of any heading to the affidavit shewing what Court it was in, and other minor grounds. Hagarty, J., following *Swift v. Jones*, set aside the arrest upon the ground of irregularity, in the title of the Court not having been inserted in the affidavit when it was filed on process issuing, but he adds, after referring to *Terry v. Comstock* and *McInnes v. Macklin*, "I desire to be understood as expressing no opinion as to my right to review the County Court Judge's decision in a case like the present."

In *Palmer v. Rodgers*, 6 U. C. L. J. 188, the form of the summons was to *shew cause why the defendant should not be discharged from custody*, and the order to hold to bail, the *capias*, the arrest of the defendant thereunder and subsequent proceedings had thereon, set aside upon several grounds, among which was the following:—"4th. Because there was not at the time of making such affidavit to hold to bail or said order, or the issuing of such writ of *capias*, a good and probable cause for the plaintiff believing that the defendant unless he should be forthwith apprehended was about to quit Canada with intent to defraud his creditors generally or the plaintiff in particular." As to this objection, Richards, J., disposes of it by saying:—"I am uncertain whether I ought to set aside the arrest on this ground or not. I have doubts as to the propriety of doing so, and stronger doubts as to my authority as a Judge in *Chambers* to do so."

In *McGuffin v. Cline*, 4 Prac. Rep. 135, the summons was to shew cause why a County Court Judge's order to hold to bail in a Superior Court action, and the arrest, &c., should not be set aside, on the ground that the affidavit was insufficient, that the reasons assigned for the plaintiff's belief were insufficient, untrue, and unfounded, because defendant was not about to quit Canada, &c., or why the amount for which defendant was held in bail should not be reduced to

\$500. Many affidavits were filed on both sides on the merits. Hagarty, J., giving judgment, says :—" I at once say that I should not have ordered the defendant's arrest on such an affidavit as seems to have satisfied the County Judge. But I have several times had occasion to express my difficulty in assuming the right to review the exercise of the Judge's discretion in a matter clearly within his jurisdiction. \* \* \* I draw a broad distinction between the case of an order based on affidavits clearly deficient in certain statutable requirements, and those which state facts from which differently constituted minds may in good faith draw different conclusions. I think I should await the positive judgment of the Court in *banc* before taking on myself to set aside a Judge's order, merely because the statements on which it was granted failed to bring my mind to the same conclusion as that of my fellow Judge," and in support of this view he refers to *Howland v. Rowe*, a case under the Absconding Debtors' Act before himself in Chambers, and in the Queen's Bench, in 25 U. C. R. 467.

The two questions stated in *Graham v. Sandrinelli*, in respect of which the Court were not agreed, and therefore gave no decision, do not appear, so far as I have been able to discover, ever yet to have received judicial solution.

The clauses of our Act, 22 Vic., ch. 96, which are consolidated in the Consolidated Statutes of Upper Canada, ch. 22, sec. 31, and ch. 24, sec. 5, are in substance identical with the clauses of the Imperial Act, 1 and 2 Vic. ch. 110, so that the decisions under that Act are express decisions governing the cases arising under our Acts.

With a view to enable the parties in these two cases, one of which is in the Queen's Bench, and the other in the Common Pleas, to bring the matters before the Courts, if so advised, I have perused all the cases I have been able to find upon the subject, and I have thought it best to enter at large into the question and to state explicitly the opinion which I have formed. The point involved is one of great



importance, and one which should not be permitted to remain any longer in doubt.

Arrest upon civil process, since the passing of 22 Vic. ch. 96, is no longer the Act of the suitor, as it was formerly—the order authorizing the issue of the writ of *capias*, the writ issued thereunder, and the arrest made in virtue of such writ are all judicial acts, deliberately sanctioned by the decision of a Judge satisfied of the existence of a cause of action wherein a plaintiff has sustained damage, and of an intent on the part of the defendant of leaving the country with intent to defraud the plaintiff in particular or his creditors in general. The whole proceeding down to and including the arrest is judicial, except in so far as the arrest itself may be vitiated by any illegal or irregular procedure in the control of the party or his agents subsequent to obtaining the judicial order, but, even in that case, the order and the writ, unless there be some defect in their form, still remain judicial acts. To the Judge to whom the application for an order to hold to bail is made, is confided by the Legislature the duty of *satisfying himself* of those matters which the law requires him to be satisfied of before he shall grant the order, as the sole condition of the making of the order. To his judicial mind are submitted all points, as well of form as of substance, which the law requires to be supplied before the order shall be made. The Legislature, I think, was well satisfied that this precaution afforded ample security that every requisite preliminary should be substantially complied with before an order for the arrest of a party should be made, and for any technical irregularity which may have escaped the observation of a Judge, or which he may have deemed to be too trifling to interfere with his making an order, it was never, as it appears to me, contemplated to be capable of being brought up before any other tribunal by way of appeal.

The Act providing that it was the mind of the Judge to whom the application was made that should be satisfied of the propriety of making an order authorizing the issue of a *capias*, the exercise of that Judge's judgment and discretion

never could have been brought in question before another Judge sitting out of Court, for any suggested error in judgment, without an express statutory provision giving such jurisdiction to a single Judge. The Court, in the general exercise of its jurisdiction over the acts of a single Judge sitting out of Court, could set aside the order without any statutory provision, but no single Judge sitting in Chambers could, in my opinion, exercise any such jurisdiction without express statutory provision. The arrest, then, of a party under a *capias* issued upon an order made by a Judge (there being no intervening irregularity in the *procedure* between the issuing of the order, and the making of the arrest) being a judicial act, and no longer the act of the party, it is not expedient that either the order, the *capias*, or the arrest should be *set aside* by another Judge for any suggested irregularity in point of form or insufficiency in point of substance in the material laid before the Judge as the foundation for the order. Any such irregularity or insufficiency must be regarded as the oversight of the Judge, and therefore after the order is acted upon, and the party arrested, that judicial act should be only called in question by a superior tribunal, which should exercise its jurisdiction in such a manner as not to make persons who acted in the arrest or applied for the order trespassers, by reason of any miscarriage of the Judge, in granting the order when in the judgment of the superior tribunal he should not have done so. A single Judge then having no jurisdiction, as it appears to me, over the judicial act of another Judge, without statutory provision giving such jurisdiction, we have to look to the Act to see whether any such jurisdiction is given, and there we find that after the arrest a particular jurisdiction is given, which may be exercised by the Judge who granted the order, even by the Judge of a County Court who may have granted an order for arrest in a Superior Court case, or by any other Judge, or by the Court out of which the process shall have issued upon the order; and the particular form in which this jurisdiction shall be exercised is defined,—namely, by an

order or rule on the plaintiff *to shew cause why the person arrested should not be discharged out of custody*. This is the only form in which, as it seems to me, the jurisdiction given by the statute to a single Judge can be exercised. Doubtless an application may be made to a Judge to set aside the writ of *capias*, and also *the arrest*, for an irregularity or defect in the writ of *capias* itself, or in the mode, time, or place of effecting the arrest, and for non-compliance with the rules of practice or procedure subsequent to the making of the order for the issue of the *capias*; but that would be an application to the general jurisdiction of the Judge in Chambers over procedure, and not an application under the special jurisdiction conferred by the Act; for such an application, it is plain, being upon a point of procedure independent of any judicial act, must be made according to the ordinary practice regulating procedure in causes pending in the Superior Courts, and could not be made to *the Judge of a County Court*, although the Judge who may have made the order for arrest. The application authorized by the Act to be made to the Court or Judge after the arrest, is, as it seems to me, plainly an application founded on new matter, for the purpose of shewing that the matters laid before the Judge upon the application for the order, (which was necessarily *ex parte*), are capable of clear explanation, or can be shewn to have been either intentionally or through mistake misrepresented to the Judge. In such a case provision is made that upon both sides being heard, the Court or a Judge to whom the application may be made may *discharge the prisoner from custody*, leaving the judicial act, which authorized the arrest, to remain unaffected as a security to all parties engaged in the arrest; and in this respect a difference is made between the jurisdiction of the Court and that of a Judge, for it is expressly provided that the *Court may discharge or vary the Judge's order*. This being so expressed in the clause, the conclusion is irresistible that the Legislature had no intention that a single Judge should have power to discharge or set aside the order of

another Judge, and the case of *Burness v. Guiranovich*, 4, Ex. 520, is conclusive upon this point. The observations also of the several learned Judges in *Needham v. Bristowe*, *Gibbons v. Spalding*, *Heath v. Nesbitt*, *Graham v. Sandrinelli*, *Pegler v. Hislop*, *Cunliffe v. Maltass*, and *Bullock v. Jenkins*, already referred to, lead, I think, to the same conclusion.

The result as it appears to me, upon a consideration of the Act itself, and to be deduced from a comparison of all the cases, is that the Court out of which the process issues has general jurisdiction, independently of the statute, over the acts and decision of the Judge granting the order, to revoke the order or to discharge the prisoner, proceeding upon the same identical material that was before the Judge. The Court out of which the process issues has, after the arrest, by the statute, concurrently with the Judge of any of the Superior Courts sitting in Chambers, and with the Judge of a County Court who may have made the order for the arrest in a Superior Court case, jurisdiction upon new matter to entertain the question whether upon both sides being heard, not the *order itself* authorizing the arrest, but its effects may be modified as justice may require, by an order for the discharge of the prisoner; and beyond this jurisdiction so given by the statute to a Judge co-ordinately with the Court, the Court has given to it by the statute the superior jurisdiction proper to be entertained by the Court, though not by a single Judge, that upon such application to discharge the prisoner being made to the Court, it may discharge, if it thinks fit, the original order. The Court, therefore, has its original jurisdiction over a Judge's order which it may exercise by appeal upon the original matter before the Judge without more; and it has also an express jurisdiction, by statute, enabling it to discharge the Judge's order; and it has, concurrently with the Judges of the Superior Courts sitting in Chambers, and with the Judges of County Courts in the special case of an order for arrest in a Superior Court case made by such Judge, original jurisdiction to entertain the question of the discharge of the prisoner, upon the merits presented, upon both sides being heard.



No appellate jurisdiction whatever, as it seems to me, is given to a single Judge. It is hardly to be conceived that the Legislature contemplated giving to a County Court Judge in a Superior Court case, an appellate jurisdiction (merely upon the original materials) over his own order for arrest made in the case ; and the jurisdiction which the statute gives to any single Judge is that given to a County Court Judge where he has himself made the order. When appellate jurisdiction is exercised, the judgment proceeds wholly upon the original material, which must be brought into the appellate tribunal. The Court never acts as an appellate tribunal without compliance with that condition. Now the material laid before a Judge for an order for arrest is filed in the Court out of which the process issues. When it issues, that material so filed can never be removed from the Court to be transferred to a Judge in Chambers, but it is *in the Court itself* to enable it to exercise jurisdiction over it as justice may seem to require, and this, as it seems to me, is what is meant by the observation of Baron Parke in giving the judgment of the Court in *Graham v. Sandrinelli*, viz : "but whether the learned Baron (Platt) was right or not in refusing to make an order to discharge only on this summons, is not material *now* ; we are all of opinion that we may consider that my brother Erle's *order* (authorizing the arrest) *and the affidavit* in support of it, *are before the Court*, and that under *our general* jurisdiction we have power to give the defendant relief, and we all think he was wrong in making the order to arrest upon such an affidavit ;" and so the Court ordered the prisoner to be *discharged*, but did not set aside the order or the *capias*.

Now in neither of the cases before me is the summons framed in the shape which, as it appears to me, is required by C. S. U. C. ch. 22 sec. 31, although in both cases new affidavits are filed. The summonses in both cases call upon the plaintiffs respectively to shew cause why the judicial act of the Judge making the order should not be set aside. This, as above stated, appears to me to be an error, and I shall

not assume a jurisdiction which I think I have not, to set aside the Judge's order or the *capias* issued thereunder for any defect or insufficiency (if any there be) in the material upon which the Judge making the order in each case exercised his judicial functions.

In *Damer v. Busby*, all the new matter introduced by affidavits was expressly waived and withheld from my consideration, the defendant electing to rest upon the alleged insufficiency of the material used before the Judge, and the variance between the copy of the *capias* and the original, and the fact that neither affidavits nor fiat are entitled in any Court, in preference to the plaintiff obtaining an enlargement to meet the affidavits filed on defendant's behalf. With respect to this case, I wish to observe, however, that I am of opinion, that there is nothing whatever in the objections contained in the heads of objection in the summons above numbered 1, 5, and 6, and I have been authorized by Hagarty, C. J., to say that he refused to grant the summons upon the suggestion of insufficiency in the statement of the debt, and that he was surprised to find his name to a summons involving that objection. *Ellerby v. Walton*, 2 Prac. Rep. 147, lately followed in *Molloy v. Shaw*, 6 C. L. J. N. S. 294, by Richards, C. J., is an answer to the 2nd, 3rd, and 4th objections. It appears to me to be as much the duty of the Clerk of Process (who alone can determine out of which Court the process is to issue), as it is of the plaintiff, to see that the affidavit is entitled in the proper Court when filed on the process issuing, and I cannot see any good reason why he should not entitle the affidavit without any order, upon the omission being discovered. As to the order itself, when made it could not be determined in what Court to entitle it, nor does the statute say that it shall be entitled; and in the present case, being endorsed *on the* affidavits, I see no occasion for its having any separate title from that contained in the affidavit, when that is inserted. As to the 7th objection, the variance between the copy and the original *capias*, doubtless if the

objection be sufficient the *arrest* may be set aside, notwithstanding the opinion I have expressed as to my having no jurisdiction to review the decision of the Judge who granted the order upon the materials before him.

In *Macdonald v. Mortlock*, 2 D. & L. 963, where a defendant was described in a *capias* as "Mortlock," and in the copy as "Mortlake," it was held that the *copy* might be amended. In a subsequent case, *Moore v. Magan*, 16 M. & W. 95, where the defendant was arrested under a *capias* addressed to the *Sheriffs* instead of the *Sheriff* of Middlesex, the Court of Exchequer held that the writ itself might be amended, but that the *copy* could *not*. If I had to choose between these seemingly conflicting cases I should have no hesitation in adopting *Macdonald v. Mortlock*; but it is not necessary, for two reasons,—first, because both of these cases were before the C. L. P. Act, and are not, I apprehend, of much weight as limiting the powers of the Court or a Judge as to amendments since the passing of that Act; and secondly, that assuming *Moore v. Magan* to be still a binding authority, it is sufficient for the purpose of the case before me; for the writ being amended to conform to the copy, all objection is removed, and indeed the copy is the more perfect of the two, as containing the Christian names of the plaintiffs instead of the initial letters of their names. I think that there is no doubt that both the Judge's order and the *capias* may in this respect be amended, to conform to the copy served. In *Folkard v. Fitzstubs*, 1 F. & F. 376, Hill, J. refused to set aside a writ of summons and also a writ of *capias* upon the ground of irregularity in that the summons was wrongly tested, "Thomas Lord Campbell," and the *capias* "Thomas Lord Campbell, Knight."

The result therefore is, that in *Damer et al. v. Busby*, the summons must be discharged; but I shall not give the plaintiff any costs, for I have no desire to countenance or encourage the carelessness displayed, both in the description of the residence of the deponent King, in one of the

affidavits, and in not taking the precaution of comparing the original *capias* with the copy before handing it to the sheriff for execution.

In *Black v. Wigle* the summons must also be discharged for the reason already stated, viz., that the frame of the summons asks that the judicial act of the Judge who made the order shall be *set aside*, and does not ask the relief indicated in the Con. Stat. U. C. ch. 22 sec. 31.

Had the frame of the summons been different, I should have held in this case that the plaintiff's affidavits in reply to defendant's so displace in my judgment the substance of the latter, that I could not have discharged the prisoner upon the ground contained in these affidavits; and as to the objection that no cause of action is stated sufficiently, my objection to review the decision of the Judge who made the order would have been the same as it now is, even though the frame of the summons had been in the words of the Act, for the discharge of the prisoner from custody. The only case in which, as it seems to me, the Judge, to whom an application to discharge the prisoner from custody is made under the provisions of the Act, upon the same material only as was before the Judge making the order, should assume the right of discharging the prisoner, would be the case of a manifest *defect*, appearing *in the material necessary to be supplied to call the judicial function into action*. For example, the Con. Stat. U. C. ch. 24, sec. 5, requires that the causes upon or in respect of which a Judge may act, shall be presented to him *upon affidavit*. Now if a paper purporting to be an affidavit, containing abundant matter to warrant the making the order if the affidavit had been sworn, be presented to a Judge, but it in fact should contain no jurat, or no commissioner's or other person's name as having administered the oath, and this defect should escape the Judge's observation, and he should make the order, and after arrest the defendant should apply for his discharge for this defect,—in such a case it may be said that the jurisdiction of the Judge *had not attached for*



want of an affidavit, and that therefore any Judge might properly discharge the prisoner from custody.

Between a cause of action not technically stated in an affidavit, and an affidavit shewing clearly that no cause of action does exist, there seems to me to be a marked difference. As to the sufficiency of the statement of the cause of action in this case I express no opinion, but as the averment, the omission of which is insisted upon as vitiating the proceedings, seems supplied in some of the affidavits now filed, if the case should come up before the Court, it will be necessary to consider the case of *Stammers v. Hughes* as explained and referred to in *Burns v. Chapman*, as also the case of *Barker v. Lingholt*, and the observations of Rolfe, B., in *Talbot v. Bulkeley*. The summons will be discharged without costs.

*Both summonses discharged without costs.*

## WEST TORONTO ELECTION PETITION.

ARMSTRONG, *Petitioner*; CROOKS, *Respondent*.

*Controverted Elections Act, 1870. 32 Vic., cap. 21, sec. 52—Return to writ—Time for filing petition—Holidays—Form of petition—Treating.*

- Held*, 1. That the twenty-one days limited for filing an election petition after the return of the writ, are to be reckoned from the time of the receipt of the return by the Clerk of the Crown in Chancery, and not from the time of mailing by the Returning Officer.
2. Good Friday and Easter Monday are holidays within the meaning of the Act, and they are not to be reckoned in computing the twenty-one days.
3. The joint effect of Ont. Stat. 32 Vic., cap. 21, and the Ontario Interpretation Act, 31 Vic., cap. 1, sec. 7, sub-sec. 13 is, that when the word "holiday" is used, it includes the above days as "set apart by Act of the Legislature."
4. The word "treating" refused to be struck out of the petition though not specifically prohibited by the Act.

[CHAMBERS, May 17, 1871.—HAGARTY, C. J., C. P.]

The respondent was the member-elect for the West Riding of the City of Toronto. On the 4th April the returning officer mailed his return to the Clerk of the Crown in Chancery, under sec. 52 of 32 Vic., cap. 21; and on the follow-

ing day this return was received and filed by that officer. On the 1st May the petition was filed, which in general terms charged the respondent or his agents with bribery, treating, and undue influence, following the form recited in the case of *Beal v. Smith*, L. R. 4 C. P. 145.

*Bethune*, on behalf of the respondent, obtained a summons calling on the petitioner to shew cause why the petition should not be struck off the files, on the ground that it was filed after the period of twenty-one days from the return to the writ of election; or if filed in time, to amend it by striking out the allegation of "treating" or otherwise, so as to state an offence contrary to the statute in that behalf.

The points mainly relied on were:—that the twenty-one days commence to run from the date of the return, or from the date of mailing: that the first and last of the twenty-one days are inclusive, and that Good Friday and Easter Monday, (which intervened during that period,) are not holidays within the meaning of the act, not having been "set apart by the Legislature."

*R. A. Harrison*, Q. C., shewed cause.

The intention of the Legislature was to give twenty-one clear business days within which to file the petition.

The time runs from the receipt by the Clerk of the Crown in Chancery, and not from the date of or from the time of mailing the return. If never received in the Chancery, great difficulties would arise from holding that the mere mailing of the return was sufficient.

The day on which the return was made is to be excluded: *Pugh v. Duke of Leeds*, 2 Cowper, 714; *Watson v. Pears*, 2 Camp. 294; *Ammerman v. Digges*, 12 Irish C. L. Rep. Appendix I.; *Isaacs v. Royal Insurance Co.*, L. R. 5 Ex. 296; *Pegler v. Gurney*, 17 W. R. 326; S. C., L. R. 4 C. P. 235.

As to holidays, the Ontario Interpretation Act and the Election Act must be read together. The latter excludes days set apart as public holidays by the Legislature of

Ontario, and in the former the word "holidays" includes, among other days, Good Friday and Easter Monday.

As to striking out the allegation of treating, see *Beal v. Smith*, L. R. 4 C. P. 145.

*Crooks*, Q. C. (in person), and *Bethune*, supported the summons:

Rule 166, under the Common Law Procedure Act, should apply, and both days are included: *Morell v. Wilmott*, 20 C. P. 378; *Morris v. Barrett*, 7 C. B. N. S. 139. Proceedings on a petition are similar to suits, and the rules applying to the latter should apply to them. As to the rule of computation at common law, see *Regina v. Justices of Derbyshire*, 7 Q. B. 193; *Regina v. Justices of Middlesex*, 2 Dowl. N. S. 719; *Rex v. Justices of Middlesex*, 17 L. J. M. C. 111.

The returning officer was *functus officio* from the time he made his return, and had completed a perfect act so soon as he executed the return. The Clerk in Chancery was not a public officer, and was under no obligation to shew his papers or to give any information; and the public and the candidates would not be injured by the returning officer failing to send the return to the clerk, as the returning officer had to file his returns also in the registry office, and had to send a copy to each candidate.

As to the holidays, the statute is explicit, and our Interpretation Act should not be referred to, except in case of doubt or the silence of the particular Act. The Act excepted public holidays "set apart" by the Legislature of Ontario. No such holidays, and in fact no holidays, had been so set apart; and these words, "set apart," mean *hereafter* to be set apart. What was meant was a non-working day—a day like Sunday. Coke, 2 Inst. 264, shews that there is a distinction between the kinds of holidays; and the Legislature had this in contemplation when in the one Act they declared Good Friday and Easter Monday "holidays" merely, and in the other Act they excepted "public holidays." And see *Tomlin's Law Dictionary*, "Holiday;" *Lush's Prac.* 352.

HAGARTY, C. J., C. P.—It is first contended, for respondent, that the twenty-one days are to be reckoned from the time of the returning officer making or mailing his return, and not from the time of its being received by the Clerk in Chancery. This depends on the meaning of section 6 of the Controverted Elections Act of 1871. The words are: "The petition shall be presented within twenty-one days after the return has been made to the Clerk of the Crown in Chancery of the member to whose election the petition relates," &c. By section 52 of the 32 Vic., cap. 21, the returning officer, so soon as he receives all the poll-books, adds them up, &c., "and shall within ten days thereafter make and transmit by mail his return to the Clerk of the Crown in Chancery; and he shall also, upon application, deliver to each of the candidates or their agents, or if no application be made, he shall, within the same period, transmit by mail to each candidate a duplicate of such return, which duplicate shall stand in lieu of an indenture." Section 56 provides that "that the returning officer shall forward to the Clerk of the Crown in Chancery, with his return to the writ of election, the original poll-books and lists of voters used at that election, duly certified as such by him."

The respondent contends that when the returning officer makes and mails his return, his duty is completed; that the return has then been made to the Clerk in Chancery, and that the twenty-one days then begin to run. I am of opinion that the time is to be reckoned from the return, *i. e.*, the actual return into the office or custody of the Clerk in Chancery, and that the mere act of the returning officer in making his return and mailing it to the Clerk, is not what is meant by the words used. It appears to me that the idea is, that the return under section 52, and the original poll-books and lists of voters, are to be finally placed on record, as it were, in the Clerk's office, where all such records are to be collected and kept; and when it is said, "after the return has been made to the Clerk of the Crown in



Chancery," it is the same as if the words were "after the writ of election and return thereto, &c., have been returned into Chancery," which latter words I think must clearly mean, then actually being in the Clerk's custody.

The respondent argues that there is no provision for inspecting the records in the Clerk's office, and the petitioners have no legal right to search there. Be that as it may, I do not think it can affect the decision. If the returning officer making and duly mailing the return commences the twenty-one days, then if by a post-office blunder the papers went astray and did not reach the Chancery till the lapse of twenty-two days, the time would have expired, and the return would never have been actually made to the Clerk in Chancery in the sense of giving that officer custody of the record. If we were speaking of a writ of execution, and either by statute or rule of Court a party to a suit had the right to take some further proceeding within twenty-one days after the return of such writ made by the sheriff to the Court from which the writ issued, my strong impression is that the twenty-one days would certainly count from the actual receipt of the returned writ in the Court, and not from some day when a sheriff in Ottawa or Sandwich wrote his return and put it into the post-office properly addressed to the Clerk of the Court, even though, as here, he was by law directed to make and mail such return to the Court. If the writ or return here had been lost or destroyed in transmission, and never reached its address, there would of course be a remedy, and another return would have to be made, as best could be done, and the twenty-one days would count from the actual receipt in Chancery of the substituted return. The provision in section 56 for the simultaneous return of the original poll-book, &c., to the Clerk in Chancery, affords another reason, I think, to shew that the time should count from the actual depositing of all these records in the proper department, where any objection apparent on their face could be properly examined.

14 notice in the Controverted Elections Act of Canada,

Con. Stat. Can cap 7, sec. 3, a provision that "if the day on which the return upon such election is brought into the office of the Clerk of the Crown in Chancery, is a day on which Parliament is not in session, or is one of the last fourteen days of any session, then the petition shall be presented within the first fourteen days of the session of Parliament commencing and held next after the day on which such return has been so brought into the office of the Clerk in Chancery," &c. The preceding statute had provided for the returning officer making an indenture with the electors as to the return, and section 70 provided for his transmitting the original poll-books with the writ of election and his return to the Clerk of the Crown in Chancery. I cite this merely as illustrative of the meaning Parliament has placed upon somewhat ambiguous words. My opinion on this point is against the respondent.

It is next objected that the petitioners have no right to exclude Good Friday and Easter Monday from the twenty-one days. Section 52 of the Controverted Elections Act of Ontario says, "In reckoning time for the purposes of this Act, Sunday and any day set apart by any Act of the Legislature of Ontario for a public holiday, fast, or thanksgiving, shall be excluded." The respondent contends that the Legislature has never in fact set apart any day for a public holiday. This is true in terms; there has been no specific setting apart of any such day. But the petitioners rely on the Ontario Interpretation Act, 31 Vic., cap 1. Section 7 says, "Subject to the limitations in the 6th section" (which provides that "unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction," &c), in every Act of the Legislature of Ontario to which this section applies, \* \* \* (13thly,) "the word 'holiday' shall include Sundays, New Year's Day, Good Friday, Easter Monday, and Christmas Day,—the days appointed for the celebration of the birthday of Her Majesty and of Her Royal successors,—

and any day appointed by proclamation for a general fast or thanksgiving." Now, as it appears to me, the weight of respondent's objection is that our late Act says "any day set apart by any Act of the Legislature, &c., for a public holiday;" and that, as a matter of strict construction, the Legislature never has in terms set any day apart. Had the words been "Sunday and any public holiday, fast, or thanksgiving," I do not think there could be any serious question but that the Interpretation Act would require us to read it so that the word "holiday" should include Good Friday, Easter Monday, &c. If respondent's contention be right, there can be no holiday in Ontario on this Election Act, unless and until an Act be passed expressly setting certain named days apart. We must of course read the two clauses together. It would then read in popular language thus, "Whenever we, the Legislature, use the word 'holiday,' we declare that by that we mean Good Friday, Easter Monday, &c., and any further days appointed by proclamation, &c. Then we tell you in the Election Act, in reckoning time, not to include any day which we, the Legislature, set apart as a public holiday, fast, or thanksgiving. We have already declared that, by holiday, it means these days in question."

It is to be noted that the "fast or thanksgiving" is not fixed or to be fixed by Act of the Legislature, it is by proclamation. So that by respondent's argument a proclaimed fast or thanksgiving could not be excluded from the reckoning, as it was not so set apart by any Act of the Legislature. But I consider the "setting apart by Act of the Legislature" has in this case been already defined in the case of a fast or thanksgiving, where it shall be proclaimed as such. I think in the same manner the requirement of the words "public holiday set apart by Act of the Legislature" is answered. The joint effect of the two clauses read together is that, when the word "holiday" is used, it includes these two days as being set apart by Act of the Legislature.

I observe in the Election Act of 1868-9 the word "holiday" does not occur, but section 30 declares that the day of polling shall not be a Sunday, New Year's Day, Good Friday, Christmas Day, First of July, or Birthday of the Sovereign. In the Interpretation Act of Canada, C.S. Can. ch. 5, the twelfth sub-section of sec. 6 defines what the words "holiday" shall include—Sunday, New Year's Day, Epiphany, Annunciation, Good Friday, &c., omitting Easter Monday and any day appointed by proclamation, &c. In the Dominion Interpretation Act, 31 Vic. ch. 1, the 15th sub-section of sec. 7, says the word "holiday" shall include Sunday, Good Friday, &c., &c., Easter Monday and any day appointed by proclamation. It should be observed that in these Interpretation Acts the word is "holiday," not "public holiday." I do not consider the respondent has succeeded in making any valid distinction between the words for the purposes of this application.

I decide against the objections. I think, in so doing, I obey the directions of our Interpretation Act in giving the words before me, "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit."

The remaining questions are, as to amending the petition by striking out the allegations of "treating" or otherwise so as to state any offence contrary to the statute. The petition is drawn in the widest and vaguest terms. It charges simply "bribery, treating, and undue influence." This general form seems sanctioned by the English practice (See *Beal v. Smith*, L. R. 4 C. P. 145), where the allegations seemed precisely similar. Bovill, C.J., in giving judgment, says:—"It seems to me that it sufficiently follows the spirit and intention of the rules, and no injustice can be done by its generality, because ample provision is made by the rules to prevent respondents being surprised or deprived of an opportunity of a fair trial by an order for such particulars as the Judge may deem reasonable."



Our statute does not specifically prohibit "treating" by name, and certain provisions in the English Acts as to giving meat or drink to individuals are omitted. Our statute, section 61, prohibits the furnishing of entertainment to any meeting of electors assembled for the purpose of promoting such elections, or paying for, procuring or engaging to pay for, any such entertainment, except at a person's residence. Now, I do not feel at liberty to insist on an alteration in the form of the petition, as possibly under the general term of "treating" some matter may be gone into, coming within our law.

*Summons discharged.\**

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### IN THE MATTER OF SOPHIA LOUISA LEIGH.†

*Custody of children—Con Stat. U. C. cap. 74, sec. 8.*

Upon an application by the mother, under Con. Stat. U. C. cap. 74, sec. 8, for the custody of her infant daughter, four years of age, the husband and wife having separated :

*Held*, after reviewing the cases decided under the corresponding English Act, that the statute in question does not take away the common law right of a father to the custody of his child, but only makes the recognition of this paternal right conditional upon the performance of the marital duty, and subjects it, in some degree, also to the interest of the child.

If, therefore, upon an application of this kind, it appears that the husband and wife are living apart, the Court will inquire into the cause of their separation, in order to ascertain, (1) Whether the husband has forfeited, by breach of his marital duties, this *primâ facie* right to the possession of his child: (2) And whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit and protection of the statute, which was intended "to protect wives from the tyranny of their husbands, who ill-use them."

[CHAMBERS, May 17, 1871.—GWINNE, J.]

This was a petition, under Con. Stat. U. C. cap. 74, sec. 8, by Mrs. Henry Leigh, praying that her infant daughter,

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\* From the above judgment the respondent appealed to the Court of Queen's Bench, but the decision was upheld.—REP.

† See *In re Kinne*, 6 C. L. J. N. S. 96, and the judgment of Adam Wilson, J., in *Re Allen*, Q. B. E. T., 1871 (not yet reported).—REP.

Sophia Louisa Leigh, aged four years, might be taken from the custody of its father and delivered to her.

It appeared, from the affidavits filed on the application, that the husband and wife had been living apart since April, 1870; the cause of separation alleged by the petitioner being her husband's ill-treatment of and cruelty towards her for eight years previous to that time. The husband, in reply, filed the affidavits and certificates of a large number of his neighbors, all of whom testified in the strongest terms to the high character which he had always borne in his social and domestic relations. He also fully met and disproved the allegation of the petitioner that, on account of hereditary insanity in his family, it would be unsafe to entrust him with the custody of the child.

The material portions of the evidence, and the cases cited upon the argument, fully appear in the judgment.

*Dalton McCarthy* appeared for the petitioner.

*William Boys*, for the respondent, Henry Leigh.

GWYNNE, J.—In *Re Taylor*, 11 Sim. 178, which was one of the first cases that arose under the English Act, 2 & 3 Vic. cap. 54, it appeared that on the 28th October, 1837, Mrs. Taylor left her husband's house, alleging, in justification of that step, a charge of adultery, which she then preferred against him, upon grounds of which she afterwards admitted the entire insufficiency, and which were, in fact, wholly without foundation. Overtures for a reconciliation were immediately made by Mr. Taylor, and various negotiations followed; but Mrs. Taylor, by the advice of her friends, refused to return home. Circumstances occurred which convinced Mr. Taylor that his wife's affections were alienated, and that no *bonâ fide* reconciliation could be expected; and he went to reside in France. Afterwards, in July, 1838, Mrs. Taylor instituted a suit in the Consistory Court of London for restitution of conjugal rights. To this suit Mr. Taylor put in an allegation in bar, stating the circumstances

under which his wife had left his house and the charges she had made against him; and adding, that although she well knew the charge to be entirely devoid of foundation, she persisted in refusing to retract it. On the 5th February, 1839, the allegation was rejected by the Court. Mr. Taylor appealed to the Arches Court, where the judgment of the Consistory Court was affirmed on the 20th June, 1839. He then appealed to the Judicial Committee of the Privy Council, pending which appeal the petition came on to be heard. At the time of the presentation of the petition, there were living five children of the marriage, two of whom were more than seven years old, but the other three were under that age, the youngest having been born on the 23rd May, 1837. The prayer of the petition appears to have been, that Mrs. Taylor might have access to her children.

For the petitioner, Mrs. Taylor, it was contended that the intention of the Act was to create a right in the mother to which the Court should give effect in all cases of separation between husband and wife where the wife had not been guilty of criminal conduct: that the clause in the Act pointing out the criminality of the mother as the only cause which should exclude her from the benefit of the Act, distinctly recognized her general right in cases where no criminality could be imputed: that the Act created a positive right of access in the mother, which the Court could not deprive her of: that the Court was merely the instrument appointed by the Legislature to put her in possession of her right: that it was the right of every innocent mother living in a state of separation from her husband; and that the discretion of the Court was to determine the *manner* only in which the right was to be enjoyed, not to take it away: that the interest of the children was the only consideration which could be allowed to interfere with the mother's right.

The Vice-Chancellor of England, however, was in that case of opinion that the jurisdiction given by the Act was to be exercised solely in the discretion of the Court; and that, pending the question in the Ecclesiastical Court, it

would not be right for the court to say that Mrs. Taylor was entitled to have access to her children. Moreover, he was of opinion that the fact of her having, without cause, removed herself from her husband, was a sufficient reason why the court should not exercise the jurisdiction of ordering any access. Accordingly no order was made on the petition.

*In re Bartlett*, 2 Col. 661, was an application under the Act, praying the delivery to the mother of two of her children, a boy and a girl under seven years of age, the girl being only two years of age ; and that she might have access to her other children, four in number. It appeared that the wife's family had brought about an unhappy state of existence between the husband and wife ; that on one occasion he had separated himself from her, and on returning to his house struck her ; that he had been bound over to keep the peace towards her ; and that he had, both in words and in writing, expressed himself towards her in a very violent and offensive manner. In giving judgment the Vice-Chancellor held that the statute did not, as a condition of the interference of the court, require that the wife should have obtained or should be entitled to obtain a divorce *a mensâ et thoro*. "This," he said, "is a case in which the husband and wife are living apart from each other," (her brothers having removed her from his house), "her husband appearing to wish, and the wife objecting to, a reunion." He says also "That she is clearly legally justified in living apart from him, it would be imprudent for me, upon the evidence before me at present, to say ; but if she is not so, that she is not without excuse, not without apology, may, I think, be safely stated." He accordingly made an order for the delivery to the mother of her youngest child (two years of age), Mrs. Bartlett's two brothers undertaking for the proper care, maintenance, and education of the child while in her custody. The order also made provision for her having access to the other children, and for access for the father to the youngest child so removed into the custody of the mother ; and it was ordered that this child should not be removed from the house of Mrs. Bartlett's brothers without the leave of the court.



*In re Fynn*, 2 DeG. & Sm. 457 (A. D. 1848), was not a petition under the Act, and no order was made upon the petition for the want of a sufficient provision being made for the care, maintenance and education of the child, if the father should be deprived of his common-law right of possession and control of his children. In that case, however, the facts were such as seemed to justify the wife in living apart from her husband, for Knight Bruce, V. C., says, "I am not persuaded, however, that she has not a good defence to the pending suit if there is one pending, or to any suit against her for restitution of conjugal rights."

In *re Tomlinson*, 3 DeG. & Sm. 371, no order was made, for a reconciliation took place while the petition stood over to enable the wife (the petitioner) to answer the affidavit filed by the husband. Knight Bruce, V. C., in this case also seemed to regard the mother's right as dependent upon her being justified in living apart from her husband; for he says there, "I should have thought it right now to make an order relating to the custody of the infant, without directing the petition again to stand over, had there appeared to me to be probability of the mother's success in the ecclesiastical suit, that is to say, in establishing that she is justified in living apart from her husband." The husband had instituted a suit for the restitution of conjugal rights, and the case had stood over for the purpose of enabling counsel from the Ecclesiastical Court to argue the case upon the validity of the mother's defence to that suit; at the close of which argument the learned Vice-Chancellor made the observations above quoted.

In *Warde v. Warde*, 2 Phil. 786 (A. D. 1849), the wife obtained a decree *a mensâ et thoro*, and the order was made on her petition. Lord Cottenham has there enunciated his opinion of the object of the Act. He says: "I must say something with regard to the position of the children under the late Act of Parliament, as to the construction of which, and the object with which it was introduced, some very erroneous notions appear to exist. The object of the Act, and of the promoters of it, and that which I think appears

upon the face of the Act itself, was to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from seeking justice from her husband, by the terror of that power which the law gave to him, of taking her children from her. That was felt to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife without the risk of any injury being done to her feelings as a mother. That was the object with which the Act was introduced, and that is the construction to be put upon it. It gives the court the power of interfering; and when the court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother, that is precisely the case in which it would be called upon and ought to interfere."

*In re Halliday, Ex parte Woodward*, 17 Jur. 56, came before Turner, V. C., in 1852. That was the case of a petition under the Act, presented by the mother, praying for the custody of her infant child, four years of age. It appeared that the husband and wife had lived happily enough together until about a year previously, when a legacy of £540 had been left to the wife, which, it was alleged, the husband had since squandered in dissipation. The money being all gone, and his wife becoming chargeable to the parish, he was taken up for deserting his wife, convicted, and sentenced to six months' imprisonment. Shortly after coming out of prison, he made his way, in the absence of his wife, to the lodgings where she was living and maintaining herself by going out as a laundress, and took away their child. He refused to state what had become of it, except that it was at board in Essex. By the affidavits filed in the matter, each accused the other of drunkenness, and in addition the wife accused the husband of adultery.

In relation to the Act and its object, the Vice-Chancellor says: "It will necessarily be important in the first place to

look at the principles upon which the Act proceeds. When this Act came into operation, it was the undoubted law of the country that the father is entitled to the sole custody of his infant children, controllable only by this court (the Court of Chancery) in cases of gross misconduct. With this right the Act does not, as I understand it, interfere so far as to have destroyed the right; but it introduces new elements and considerations under which that right is to be exercised. The Act proceeds upon three grounds: first, it assumes and proceeds upon the existence of the paternal right; secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right; thirdly, the Act regards the interest of the child. These three grounds, then—the paternal right, the marital duty, and the interest of the child—are to be kept in mind in deciding any case under this statute.” He then cites *Warde v. Warde*, in confirmation of his view, and says, “I think there is a very great difficulty in calling on the court to restrain a man in the exercise of his legal right. \* \* \* \* There are, however, two grounds on which the court has jurisdiction under the Act viz., breach of marital duty, and the interest of the child. That the husband did desert his wife previously to May, 1851, he does not deny; but he justifies the desertion as necessary. It is, therefore, incumbent upon me to look into the conduct of his wife. The charge against her is that of habitual drunkenness.” The Vice-Chancellor, upon the evidence, came to the conclusion that this charge was not proved; and, referring to the conduct of her husband taking away her child from his wife’s lodgings, and to the fact that he did not even inform the court where the child was, except that it was at board in Essex, he proceeds: “Is it, or is it not, in contravention of the marital duty, which the Act has placed in competition with the paternal right, that the husband should thus take away his children and keep them without any communication with the mother as to the mode, or place, or circumstances of their maintenance? The natural right must be held to have been modified by the Act, and the same

opportunities must now be given to the mother as to the father of communicating with the offspring. Then there is to be considered the question of access only, or of custody of the child; and that depends upon what is most for the interest of the child in the position of the parties." And finally, he says: "But I shall decide, if possible, rather in favour of the paternal right than against it; and I therefore give now an option to the father to place his child to be taken care of where the mother can have access to it, and see that it is properly attended to, so that she may have the benefit intended by the Act. Unless it be shewn by affidavit on the next seal day that this has been done, I shall direct the child to be delivered over to the mother."

In *Shillito v. Collett*, 8 W. R. 683 (A. D. 1860), the application was by the mother against the testamentary guardians of the children, appointed by her husband's will, for the custody of three children, all under seven years of age. The observations of Kindersley, V. C., in that case, are to be taken as applying to the particular circumstances of that case, which from its nature raised no question arising out of the fact of a husband and wife living apart. The stress which he lays upon the interest of the children being the point to decide the case, must be limited to the case before him. This sufficiently appears to be the intent of the learned Vice-Chancellor, from the context of his judgment; and it is therefore by no means an authority for the position, that in the case of separation between husband and wife the cause of separation is to be overlooked, and that the sole point for consideration is the benefit of the children. He says there, "Beyond all doubt, if it had not been for Mr. Justice Talfourd's Act, the guardians could have assumed the conduct themselves of the education and maintenance of the children; but under the statute the court has the discretion, either against the father or the testamentary guardians, as in this case, where any of the children are under seven years of age, if it sees fit, to decide that the custody shall be given to the mother, although she was not appointed guardian. With respect to



the age of the children, the Legislature considered that as between the guardian and the mother, the very young children required a mother's nurture ; and, notwithstanding the legal rights of a father, they should be intrusted to her. But it still enabled the court to do that which it thought best for interest of the children. It did not consider that, as between the father and mother, the father had an equal interest with her, but that in the majority of cases the custody should be given to the mother ; but, under ordinary circumstances, it was most desirable that it should be entirely discretionary in the court." In the exercise of that discretion, the Vice-Chancellor was of opinion that he " must look at the interest of the children, which might be just as well preserved by giving the custody either to the father or the mother, the tendency being to lean towards the mother when the children were of very tender age ; but still the material question was, what was for the children's benefit ?" He then proceeds to shew why, in that case, he thought the discretion of the court would be best exercised by leaving the children in the custody of the testamentary guardians. There is nothing in this case which countenances the idea that the learned Vice-Chancellor intended to cast any doubt on the propriety of the observations of Lord Cottenham in *Warde v. Warde* ; of Turner, V. C., in *Re Halliday* ; or of the Vice-Chancellor of England, in *Re Taylor*, in a case where husband and wife were living apart.

In *Re Winscom*, 11 Jur. N. S. 297 (A. D. 1865), the application was made by the mother for access to her female child, eight and a half years old ; but the principle upon which the right of access and custody depends is the same. In that case the husband had petitioned the Divorce Court for a divorce upon two allegations of adultery, one of which was condoned, and the second not established, and so the petition for divorce was dismissed, but the husband and wife lived apart. Wood, V. C., in that case, rests upon Lord Cottenham's decision in *Warde v. Warde*, as establishing the intention of the Act, and the course of the court in relation to it ; and applying these observations to the case before him,

after stating the circumstances under which the husband and wife were living separate, he says, p. 299 : "The consequence is, that they are not separated from the matrimonial tie ; but it could not, as I apprehend, be with any great hope of success suggested that the lady is in a position to institute any suit for the restitution of conjugal rights. Nothing of the kind is suggested, and they must, for the present, remain apart."

And again : "But further, I have had to consider most seriously how far it would help her for me to interfere at all with the father's directions in a case circumstanced like the present. In the first place, it is not clearly a case in which, according to Lord Cottenham's view, the court is called upon for any interference whatever. It is not a case in which, to use Lord Cottenham's expression, the mother requires protection from the tyranny of her husband."

Our Act, Con. Stat. U. C. cap. 74, sec. 8, is identical with the Imperial statute 2 & 3 Vic. cap. 54, with the exception that in our Act the age of twelve years is substituted for seven years, and that the jurisdiction which the English Act confers on the Lord Chancellor and Master of the Rolls is, by our Act, conferred upon the Superior Courts of Law and Equity, or any Judge of such courts.

From all the above cases, the true principle to be collected I think, is, that the court or a Judge, in the exercise of the discretion conferred by the Act, is bound to recognise the common law right of the father, and should not assume to impair or interfere with that right, so long as the father fails not in the due discharge of his marital duties. In order to induce the court to interfere on behalf of the wife, she should satisfy the court that the separation, if the act of the husband, is in disregard of his marital duties, that is, without sufficient cause given by the wife ; or, if the act of the wife, that although she may not have cause sufficient to entitle her to a decree for judicial separation, she has reasonable excuse for leaving her husband and living apart from him ; *and further*, that it should not appear that it is not the interest of the children that she should

have access to them, or the custody of those under the age mentioned in the Act in that behalf. The object of the Act being to protect wives "against the tyranny of husbands who ill-use them," a wife can have no right under the Act who should capriciously or without some reasonable excuse desert her husband, absent herself from his home, and abandon her duties as a wife and mother. In view of these principles, it will now be necessary to enquire whether the petitioner in this case brings herself within them, so as to entitle her to the interposition of the jurisdiction conferred by the Act.

It is difficult to conceive anything more contradictory than the statements contained in the affidavits of the wife, her mother, and of Margaret McKay, on the one side, and in the affidavits of the husband and others, filed on his part, in the material points. By the affidavit of Mrs. Leigh it appears that she and Mr. Leigh have been married for ten years; and she alleges that for the last eight years her husband has been in the habit of abusing, insulting, and maltreating her in the most shameful manner, not only in vituperative language, but also by inflicting upon her grievous bodily injury; and she says to such an extent has he carried his cruelty towards her, that frequently, through the effects of his brutal treatment of her, she has been so ill that her life has been despaired of; and that whilst so ill her husband manifested such perfect indifference as to her condition, and so neglected her, that she had to apply to her mother for her care and protection, and even for the common necessities of life; and that finally, from the continued and constant ill-treatment she received from her husband, and being pregnant of her youngest child, and being apprehensive of danger to its life and to her own, she, in pursuance of the advice of her physician, left her husband's house in April, 1870, taking with her her three children, now aged nine, eight, and four years respectively, and has since continued to reside with her mother. The affidavit then alleges that the father, on the 5th April 1871, succeeded in getting possession of her child of four years of age, and in taking it away; and avers that since

it was so taken away the mother has never seen the child, nor does she know of its whereabouts. The affidavit then proceeds to allege that two of the husband's brothers have for a long time been subject to fits of insanity, and that the wife, from her husband's treatment of her, and his general demeanour, has no hesitation in saying that he is, and for some time has been, subject to fits of insanity ; and that she has no doubt he was under the influence of one of such fits when he took away his child, on the 5th April last ; and it alleges that the mother is well able to supply all the wants of the children.

Now, the first observation which strikes one upon the perusal of this affidavit is, that it is strange that no single particular instance is given of the ill-treatment, which, it is said, has continued for a period of eight years, during which the life of the wife, in consequence of such ill-treatment, was frequently despaired of. If the husband is one of a family long afflicted with fits of insanity, and if he himself, as is alleged, has been subject to such fits, and under the influence of them has, for a period of eight years, in the midst of a civilized community, treated his wife, to use the language of her mother, " more like a brute than a natural creature ;" and if, in consequence of such treatment, the wife, acting upon the advice of her physician, found it necessary to leave her husband's house, and fly with her children for protection to her mother, surely abundant and indisputable evidence could be adduced as to the truth of the charges. The only evidence, however, which has been offered is that contained in the affidavits of the wife, her mother, and the hired servant now living with them, and who, it appears, did at one time live with Mr. and Mrs. Leigh, for about four months, in the year 1868.

The husband, in his affidavit, contradicts, in as express terms as is possible, the general charges made against him ; and he states matters which are wholly uncontradicted, and which, being uncontradicted, I should be obliged, even though not confirmed, to treat as true upon this application, but they are confirmed in most important particulars by the



affidavits of other persons. These affidavits appear to establish that reliance cannot be placed on the affidavits filed by the petitioner, upon the essential points offered to evoke the jurisdiction conferred upon me by the statute.

Leigh, in his affidavit, after extracting the material allegations from the affidavit of his wife, says that there is not a word of truth in any of such statements ; that he has never in any way abused or ill-treated his said wife or any of his children, and that she left him entirely without cause : that he and his wife lived always on good terms up to the time she left him, and that when she did leave him it was without any previous misunderstanding whatever : that she had asked him to drive her and the little girl (the custody of whom is now in question) out to her mother's, and to let her stay two or three days, and that he did so ; and that on leaving her at her mother's, it was arranged between him and his wife that he should take them back home on the following Sunday : that accordingly he went for them on the Sunday, but that his wife's mother said they had better not return that day, it was so very cold : that he then returned without them, and without any suspicion whatever that his wife did not intend to return to him, he having parted with her then on the best terms : that previous to his leaving on that occasion, it was arranged that Mrs. Bull (his wife's mother,) should drive his wife and child home : that having waited for a week without their returning, he went over to Mrs. Bull's again, and then asked his wife if she was going to forget him altogether, to which she made no answer ; and that then, for the first time, he saw that there was something wrong ; and that he had again to leave the mother's house, and return home without discovering what was the matter, or what his wife intended to do : that on the next day he again went to see his wife, and found her at Mr Steele's house ; that she at first hid from him, but that on his asking for her she came out, and shook hands with him ; but on talking to her there, she at last told him that she did not intend returning to her home : that he returned home alone, and that shortly afterwards Mrs. Leigh got possession of the other two children by

taking them on their way home from school. He then proceeds to contradict the several other charges made against him ; and after retorting charges against her in relation to her temper and ill-treatment of her children (which is much to be regretted, as this case cannot be made to depend upon the relative suitability of either to have sole charge of the children), he concludes by saying that he is still and always has been willing and anxious that his wife should return and resume her proper place in the management of his household ; and that she keeps away from her home entirely against his will.

This affidavit is accompanied by certificates, signed by about twenty of his neighbours, who have known him for periods varying from ten to forty years, describing him to be a sensible, upright, honest, trustworthy, respectable man, of sound judgment, a good and obliging neighbour, to whose disparagement nothing is known ; that he bears the best of characters ; and one describes him to be noted as a good husband and kind father—a man of good sense, steady habits, and amiable disposition, and esteemed so by all his neighbours.

Mr. John Steele, who has been for thirteen years reeve of the township in which Leigh lives, states, on affidavit, that he has known Leigh for eighteen years ; that during all that time he has always found him to be a temperate, well-conducted man ; that he has known the brothers of Leigh also for eighteen years, and that he has never heard of any of them being insane, or subject to fits of insanity ; that his brother Leonard, upon the occasion of his wife's death, was much overcome with grief for about a month ; and this, as well from Mr. Steele's affidavit as from that of Mr. Simpson, who was Leonard Leigh's father-in-law, seems to be the only foundation for the charge of insanity. Mr. Steele also states that about three years ago Mrs. Leigh was very ill, and was expected to die ; and that, as she owned some separate property, Mr. Steele was sent for to draw her will ; and he says that then she spoke highly of her husband, and of his kindness to her—that he had been a good husband and father. He also states that until Mrs. Leigh left her husband, her

mother, Mrs. Bull, always spoke highly of Leigh, and considered him an excellent man. Mr. Steele also says, that he was present at Mrs. Bull's on the day that Leigh's wife remained there on account of the coldness of the weather ; and that from the manner of Mr. and Mrs. Leigh to each other, he (Mr. Steele) had no idea she was going to leave her husband, and that he was quite surprised when a short time afterwards he heard that she would not return to him.

A Mr. Lawrence, a medical man, states that he attended Mrs. Leigh and the family during the years 1867-8-9 ; that during those years she was twice dangerously ill—once from inflammation of the lungs, and the other time from pleurisy ; that during these periods her husband manifested the greatest concern for her, and paid her the greatest attention and procured for her everything she required. He adds, that he has had many opportunities of judging, and that he has never seen any trace of mental disease in Leigh ; that he does not believe there is any ; that he is in fact a quiet man, and by no means excitable or violent, in any way. Then there is the affidavit of a Mrs. Charlotte McCalman, who lived in Leigh's family for upwards of six months in 1868, and during the period that Margaret McKay was there. She describes the conduct of Leigh towards his wife, and also towards his children, as most kind and affectionate ; she describes him as a kind husband and father ; that he never ill-treated his wife, but was always kind and attentive to her ; that he was fond of his children, and they of him. Andrew Home and Charles Morgan describes Leigh as a quiet, sober, industrious man, who holds a very respectable position as a farmer in the township ; and say that they have never known or heard of his being insane, or in any way violent or peculiar in temper. Then there is the affidavit of Mr. Simpson, who has known Leigh's family for forty years, and is the father-in-law of his brother Leonard. He says, that Henry Leigh, the petitioner's husband, is a kind-hearted man ; that he has always been sober and well conducted, and that he does not believe any of the statements to the contrary made by his wife in her affidavit filed in this matter ; that in his belief the wife

has no just cause whatever for leaving her husband, and that he believes the trouble between them to be of her own making, under the instigation of her mother; and as to the imputation of insanity in the family and in Henry Leigh, he says he has never known or heard of anything of the kind, and in effect he says the only foundation for the charge is that Leonard Leigh was out of his mind with grief for the loss of his wife for one or two months after her death, but that he got over it, and has ever since been perfectly sane.

Upon the whole, the only conclusion at which I can arrive upon this evidence is, that the petitioner has failed in satisfying my mind that she has had any excuse for leaving her husband's home and her duties as a wife in the manner she appears to have done. Her allegations and those of her mother, and of Margaret McKay, are contradicted by Leigh himself as plainly as they can be, having regard to the generality of the charges; and the uncontradicted account which Leigh has given of the manner in which his wife left him and got possession of all his children, so diametrically opposed to the account of the same transaction given by the wife, coupled with the confirmation which I think Leigh receives from the affidavits of the other persons filed by him, forces upon me the conviction that reliance cannot be placed on the statements contained in the petition filed; and that I cannot do otherwise than discharge the application, without incurring the danger of giving rise to a belief in ignorant minds that the duties of the married state are less obligatory upon the wife than upon the husband.

I have not thought it necessary to refer to the mutual charges of unfitness of either alone to have the charge of children, because of the opinion which I have formed that the petitioner has not established such a case as in my judgment warrants my interfering with the paternal right. But in view of the character for sound judgment and amiability of disposition given by his neighbours to Mr. Leigh, and to the character of Christian meekness and gentleness given to Mrs. Leigh by the Rev. Mr. Ferguson and others, I venture to express the hope that both husband and wife will yield to



their better feelings, and agree to forget their differences, from whatever cause they may arise, and live together in love and affection ; and that Mrs. Leigh will not permit any one to lead her away from the discharge of the duties imposed upon her by her marriage contract ; and that she shall resume, as desired by her husband, her proper place at the head of his household. If, unfortunately, different counsels should prevail, and if the wife should at any future time be advised to renew this application, I should certainly, if the application should be made to me, require the parties and witnesses to be examined *vivâ voce* before me, for the purpose of arriving, if possible, at the truth as to the grounds of an alienation which, upon the material at present before me, I am obliged to say, appears to me to be causeless.

In the hope of avoiding adding bitterness to the feelings of either of the parties, and of aiding in the promotion of a good understanding between them, I shall discharge the present summons without costs.

*Summons discharged.*

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### LUTZ V. BEADLE.

*Ejectment—Order for costs—Purchaser after action brought.*

In an action of ejectment, the defendant appeared and claimed title as tenant of one R. Two days before appearance, R. had disposed of his interest in the lands to S., who after notice of trial, applied on affidavits setting out the conveyance and the subsequent attornment to him of defendant (now his lessee) to be admitted as landlord to defend the action ; but the application, being opposed by the plaintiff, was refused. Plaintiff having succeeded, applied for a rule ordering S. to pay the costs of the action, on the ground that the defendant was insolvent, and the conduct of S., both in making the above application and at the trial and subsequently thereto, proved him to be the real defendant. *Held*, that plaintiff was not estopped from making such an application by having opposed the prior application of S., and the rule was made absolute.

[P. C., E. T., and June 24, 1871.—GWYNNE, J.]

This was an action of ejectment, in which judgment was obtained by the plaintiff.

*Freeman*, Q.C., during last term, obtained a rule calling upon one Simeon Cline to shew cause why he should not be

ordered to pay the costs of the plaintiff in the suit, upon the ground that the defendant was only nominally interested as tenant of Simeon Cline, and that the suit was defended in the interest, and for the benefit of the said Cline.

*F. A. Read* shewed cause.

The facts sufficiently appear in the judgment.

GWYNNE, J.—The cases of *Hutchinson v. Greenwood*, 4 E. & B. 324, 24 L. J. Q. B. 2; *Anstey v. Edwards*, 16 C. B. 212, and *Mobbs v. Vandenbrande*, 33 L. J. Q. B. 177, sufficiently establish that the Court has jurisdiction to make the order asked for, under the 77th section of the Consolidated Statutes of Upper Canada, ch. 27, notwithstanding that the action of ejectment is no longer a fictitious one. The only question, therefore, appears to be, whether it is or is not proper, under the circumstances as they appear, that, I should exercise that jurisdiction.

By the affidavits filed on the part of the plaintiff, it appears that the action was commenced on the 23rd day of April, 1869, and was entered for trial at Hamilton in the fall of that year. An appearance was entered for the defendant on the 10th day of May, 1869. With this appearance was filed a notice to the effect that, besides denying the plaintiff's title, the defendant claimed to be entitled to the possession of the said lands as tenant of Ransom Cline. In the month of October, 1869, and just before the cause was entered for trial, Simeon Cline applied to be made a defendant in the cause jointly with the defendant Beadle. In an affidavit made by him upon that application, a copy of which was filed in support of the present application, after setting out the service of the writ upon Beadle, his appearance, and notice of claim as above, he swore that on the 8th day of May, 1869, he, Simeon, purchased the interest of Ransom Cline in the said lands, and that, on the 17th day of June following, the said Beadle attorned to and became tenant of the said lands under Simeon, and accepted a lease thereof from him for the term of one year, at the yearly rent of one dollar; that Ransom Cline had not appeared to the said action; that he, Simeon,

was then in possession of the land by his tenant, the defendant Beadle ; and that notice of trial had been served on the 29th September, for the then next assizes to be held in the county of Wentworth, on the 11th of October then instant.

This application, being opposed by the plaintiff's attorney upon the ground that Simeon had purchased after action brought, was refused.

In the plaintiff's affidavit, filed upon the present motion, he swore that Simeon Cline attended at the trial, which took place in the month of April, 1870, and that he appeared to be the only person interested in the defence ; that he was instructing the attorney and counsel for the defendant, and looking after the witnesses, and taking on himself the entire management of the cause ; and that plaintiff believes that throughout the whole progress of the suit, or, at all events, since he purchased the alleged interest of Ransom Cline, in May, 1869, as stated in his own affidavit, he has been the only person who had given instructions for the defence of the suit, and who has been really interested in the result thereof. The plaintiff further swore that at the trial, neither the defendant, nor Ransom Cline, who is a brother of Simeon's, appeared to have anything to do with the suit, except as witnesses ; that the defendant Beadle is hopelessly insolvent, and has no property whatever out of which the plaintiff can recover his costs of suit ; and that several times since the commencement of the suit, Simeon Cline has told the plaintiff that he, Simeon, claimed the property as his own ; and that since the trial he has said to the plaintiff that he would yet have the property, and that he would not submit to the verdict rendered.

Simeon Cline filed no affidavit of his own in answer to this application, but an affidavit of the attorney of the defendant on the record was filed, and he swore that, on the 7th day of May, 1869, he was retained and employed by the defendant Beadle and by Ransom Cline, who then claimed to be the owner of the property in question in the cause, and from whom the defendant Beadle leased the same, as attorney to defend the suit : that he entered an

appearance for the defendant on the 10th May, 1869, and at the same time served a notice of claim of title under Ransom, which he set out at large, and which is to the effect stated by plaintiff in his affidavit. The attorney further swore, that he never knew Simeon Cline in any way in the matter of the suit up to the 21st day of May, 1869; nor did he ever receive instructions of any kind from him in the above suit previous to the said 21st day of May, 1869. This is the only affidavit used in answer to the motion.

I was asked by Mr. Freeman also to notice judicially the evidence taken at the trial, and which was before the Court of Common Pleas on a motion to set aside the verdict (upon which motion judgment has been given sustaining the verdict), with a view to seeing that the defendant was put forward solely for the purpose of asserting the title which Simeon Cline claimed at the trial, and that the whole defence was in his interest. On the other hand, Mr. Read objected that I should only look to the matters brought before me on affidavit on this application.

I think there is sufficient before me on this application to determine the point: Simeon Cline makes no affidavit himself, and his affidavit, made in October, 1869, expressly states that he asserts title in himself, and that the defendant was only in possession as his tenant; and the affidavit of the attorney on the record admits, as I take it to admit, in effect, that his original instructions were from Ransom Cline, whose interest Simeon Cline acquired by a purchase made before appearance entered, and that since the 21st day of May, 1869, before ever Beadle attorned to Simeon, or took the lease for a year at one dollar rent, he had taken his instructions from Simeon. I take it to be established beyond all doubt, that Beadle has been throughout only nominally a defendant, and that the defence has wholly been made by and in the interest of Simeon Cline.

The case which is established is, then, the common case for making the order asked for, unless the fact that the plaintiff by his attorney opposed Simeon's application to be admitted to defend as landlord is subversive of his claim to



have his present motion granted, and this, in fact, was the only ground upon which the rule was opposed.

No case has been cited to me in support of this contention, and upon reflection I do not think that the fact of the plaintiff having opposed the former application should prejudice the present one. He may possibly have thought that the alleged sale to Simeon Cline was a fraudulent contrivance, and that it was still Ransom who claimed the property, and he may have wished to retain a claim upon him; but, it now appearing that it was Simeon who really defended in his own interest, he seeks to make him responsible. Simeon, by making the application to defend, admitted his liability for the costs of the defendant in right of the interest which he claimed in the property. Had he been admitted to defend, he would have been subject to the costs, and liable to pay, because of such his alleged interest, and of the defence made upon behalf thereof.

Although not admitted to defend, Simeon's interest has remained the same, and he has had the benefit of asserting his claim to the property to the same extent precisely as if he had been a defendant. The defence made to the suit has been no less his defence, and in his interest, than it would have been if he had been a defendant on the record. He has had the full benefit of it, as if he had been admitted a defendant on the record, and I cannot see any reason why, having enjoyed this benefit, he should not also bear the burthen. He must be clearly liable to the plaintiff unless the latter's opposition to his application operates as an estoppel to his making the present motion, and I cannot see that it should be held so to operate.

In justice, therefore, I think the rule must be made absolute.

*Rule absolute.*

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IN THE MATTER OF ARBITRATION BETWEEN LEWIS HOTCHKISS  
AND WILLIAM HALL.

*Arbitration—Setting aside—Shewing cause to rule—Misconduct of arbitrator—  
Reception of improper evidence.*

On application to set aside awards for misconduct of arbitrators, the facts which are relied upon to establish charges of partiality and unfairness on the part of an arbitrator must be clearly averred.

*Quære*, as to the right on such application to shew cause on the last day of Term.

The decision of an arbitrator being binding on the parties in matters of law as well as in fact, an award will not be set aside because letters are put in as evidence by one of the parties which are not legal evidence, if the circumstances and the conduct of the arbitrators are consistent with the supposition that they only read the letters for the purpose of judging of their admissibility as evidence, and it does not appear that they actually received them as evidence.

A taxation by a Deputy Clerk of the Crown of costs under an award, on a reference to arbitration of two causes in different courts, together with all matters in difference, is not a nullity, as being beyond his jurisdiction, and probably not even an irregularity.

[P. C., E. T., and June 24, 1871.—GWYNNE, J.]

On the 1st day of April, 1870, there being two cross actions pending between the above parties, they, by an agreement of that date, signed by them, agreed to refer the said actions, and all matters in difference between them, to the award, order, final end and determination of Thompson Smith and Stephen T. Peckham; and in case the said arbitrators should not agree in determining any matter or thing or matters or things thereby referred to them, the matter or thing in which they should not agree should from time to time be referred to and determined by such person as they should appoint in writing, before entering upon the consideration of the matters referred; so as the award or umpirage should be made ready to be delivered on or before the first day of May then next, or on or before any other day, not latter than the first day of July then next, to which time the said arbitrators were empowered to enlarge the time for making the said award and umpirage.

Nothing having been done under this submission, the above parties, Hotchkiss and Hall, by an agreement signed by them, endorsed on the agreement of reference, and dated the 18th February, 1871, enlarged and extended the time for making an award under the terms of the agreement

until the first day of May, 1871. Thereupon, and before entering upon the consideration of the matters referred, the arbitrators by an appointment endorsed on the agreement of reference and signed by them, appointed Henry Stark Howland as umpire, under the terms of the reference.

The arbitration was thereupon proceeded with throughout, in the presence of the arbitrators and the umpire.

The arbitrators, Smith and Peckham, made their award in the premises, signed by them, upon the 17th March, 1871; and a copy of the award so made was served upon Hotchkiss, at the instance of Hall, upon the 28th day of March last.

By the submission it was agreed that the same should be made a rule of the Court of Queen's Bench, and early in Easter Term last it was made a rule of that court. On the 22nd of May a rule *nisi* was obtained, at the instance of Hall, calling upon Hotchkiss to shew cause why the money directed to be paid by the award should not be paid in pursuance of it. Upon the 30th May this rule was made absolute, no cause being shewn to the contrary, and all the conditions entitling the applicant to such an order having been fulfilled.

On Friday, the 2nd June, *McCarthy*, on behalf of Hotchkiss, moved for a rule *nisi* to set aside the award on various grounds.

*C. Robinson*, Q. C., being present in court, intimated his intention to shew cause in the first instance, and Mr. McCarthy proceeded with his motion but at the rising of the court had not concluded. In the course of his argument he mentioned certain matters which, he said, appeared on affidavit. Being requested to read that affidavit, he found that he had it not with him in court; and upon leaving court at its rising, the learned Judge said that he would hear the affidavit in the morning.

On the following morning it appeared that after the rising of the court two affidavits had been filed, including the one which had not been in court during the argument. After citing a case, Mr. McCarthy desired that it should be con-

sidered that his motion had been closed on Friday, and insisted that under an old rule of the court of King's Bench in England, 36 Geo. III., cause cannot be shewn on the last day of Term to an application to set aside an award ; but, by leave of the learned Judge,

*C. Robinson*, Q. C., (*O'Brien* with him), proceeded to shew cause, subject to this objection.

*D. McMichael* and *McCarthy* supported the rule.

The facts of the case, the objections taken, and the authorities cited, are fully stated in the judgment.

GWYNNE, J.—In the latest edition of Mr. Archbold's work, although this old rule cited by Mr. McCarthy, that cause cannot be shewn on the last day of Term, is referred to, it is stated that in modern times the practice is sometimes departed from ; and in this case, if it is competent for me, I esteem it my duty to relax the rule. When the court rose upon the Friday, the motion had certainly not been concluded ; a material affidavit, which was relied upon, was not in court, and I consider it to have been well understood by all parties, as it was by the court, that the motion should be renewed in the morning. I must therefore consider that the motion is too late, as having been carried into and made on the last day of Term, or I must give to Mr. Robinson the benefit of being considered to have opened his case on the Friday, and continued it only on the Saturday. A rule which must be considered as having been established to promote convenience cannot, I think, be permitted to be appealed to for the purpose of effecting what would manifestly be an injustice. I consider, therefore, that I am not only not prevented by rigid rule from considering the argument as heard, but that it is my duty, in the particular circumstances, to prevent the objection prevailing.

The grounds stated in the motion paper for setting aside the award are as follows :—

1st. That Thompson Smith, one of the arbitrators to whom the said matters were referred, was partial and corrupt in his conduct as such arbitrator, and acted through-



out in an unfair and unjust manner towards the said Lewis Hotchkiss.

2nd. That the said Thompson Smith heard the statements and examined the papers of the said William Hall with reference to the matters submitted behind the back of the said Lewis Hotchkiss, and at times when the said Lewis Hotchkiss had no notice or knowledge of such statements being made, and when no meeting for the prosecution of the said reference had been appointed.

3rd. That the said Thompson Smith and William Hall had consulted together with reference to the matters pending before the said arbitrators, from time to time, during the time that the said reference and hearing were being had.

4th. That the said arbitrators improperly admitted and received as evidence letters alleged to have been written to one Wood by persons unknown to the said Lewis Hotchkiss, alleged to be in respect to the way the lumber said to be manufactured by the said William Hall for the said Lewis Hotchkiss, was manufactured, and as to whether the same was merchantable or not, which were the chief matters in dispute between the said parties, and in respect to which the said submission was made.

5th. That the said Thompson Smith acted improperly in refusing, during a portion of the time that the said reference was being heard and proceeded with, to permit or allow the said Lewis Hotchkiss to have notes made by a third person, although the said Lewis Hotchkiss was unable to take or make notes himself of the evidence of the witnesses examined on behalf of the said William Hall.

6th. The motion paper also asks that the rule made, ordering payment of the amount of the said award and the costs taxed in pursuance thereof, and the execution issued thereupon, may be set aside or rescinded on the grounds aforesaid; and on the further ground, that the said costs purporting to be taxed in pursuance of the said award were taxed irregularly and improperly by the Deputy Clerk of the Crown and Pleas for the County of Simcoe, who had no power to tax the same.

The first, second, third, and fifth, of the above grounds,

attack the conduct and motives of one only of the arbitrators, Mr. Smith. The affidavits upon which the application is based impute to him partiality and corrupt conduct in this, that, as is charged, he acted throughout in an openly partial and unfair manner, and as the advocate of Hall, and not as an arbitrator, and to this conduct the applicant Hotchkiss imputes the result that an award unfavourable to him has been made, and which he considers as unjust.

The first ground, taken by itself, is altogether too vague to be entertained as an accusation against a person filling a judicial office: *Burr v. Gamble*, 4 Grant 626. In *Beddington v. Southall*, 4 Price, 232, cited by McLean, J., in *Slack v. McEathron*, 3 U. C. R. 184, it is laid down that "the court requires *strong facts* and to be *distinctly* stated, in cases of setting aside awards, and that a denial of any such is conclusive." Charges of corruption should not be imputed upon slight grounds. The facts which are relied upon as establishing the charges should be clearly, unequivocally, and positively averred. Judges of the parties' own choice must not be permitted to be exposed to accusations of corruption based upon loose surmises, suspicions, and conjectures of disappointed suitors, or upon insinuations of corrupt inuendoes attached to words innocent in themselves, and naturally capable of an honest interpretation. In this case the charges of partiality and corruption made against Mr. Smith are, in my judgment, wholly displaced by the affidavits filed in answer.

Mr. Howland, the umpire, who was present during the whole of the arbitration, says that he has read a copy of the affidavit of Lewis Hotchkiss proposed to be used as he is informed, in an application to set aside the award, and he says that the statements and insinuations of said Hotchkiss, as to partiality and unfairness on the part of Thompson Smith, one of the arbitrators, at the said arbitration, are unjust and unfounded: that the whole conduct of said Smith during the said arbitration was only that of an arbitrator desiring to elicit the truth from the witnesses, without reference to whom they were called by, and he acted throughout with great fairness to both parties, and not as an advocate for either, and the arbitration was

conducted in a fair, open, and proper manner; and he says that the award was concurred in by the two arbitrators, and having been present as umpire during all the proceedings, he adds that the award was a fair and equitable adjustment of the matters in difference between the parties. Four other persons who were examined as witnesses before the arbitrators, and one of them as a witness for Hotchkiss, swear that Mr. Smith shewed no partiality to or preference for the said William Hall, and that both he and his arbitrator, Stephen T. Peckham, acted throughout fairly and impartially, and fairly, honestly, and justly endeavoured to elicit the truth with regard to the matters in dispute.

With reference to the second and third grounds of objection I cannot find a single fact alleged in support of the grave charges comprehended under these heads. Mr. Hotchkiss says that he *charges* and verily *believes* the accusations to be true, but offers not a particle of evidence upon which his charge and belief is founded, except that he alleges that the documents, books, and papers used by Hall in evidence were from time to time produced by the said Smith, and handed to the said Hall for the purpose of being used in evidence in the said matter before the said arbitrators.

Now the only foundation for the above grave charges is explained by the affidavits of Hall, and Mr. Howland, the umpire, in this manner:—The arbitration was held at the Queen's Hotel, Toronto, and continued seven days; at the commencement of the arbitration Hall produced a large bundle of books and documents which he required to refer to during the arbitration, and handed them in to the arbitrators. All those papers, and all papers and vouchers produced at the arbitration, were kept in a desk belonging to Smith, locked up when the arbitration rose from day to day, and the key was kept by the umpire or Smith, and the desk placed in the safe of the Queen's Hotel; constant reference was made to these papers in said desk during the arbitration, and the papers were handed to the parties by Smith from it when asked for or required. As to the charges themselves, Hall, in his affidavit, unequ-

vocally denies them, and says that the only statements that he ever made of his case to Mr. Smith (except on the arbitration), were such as it was necessary to make for the purpose of explaining the points under dispute generally, in order to obtain Mr. Smith's consent to act as arbitrator, which position he was averse to undertaking, owing to his other engagements.

The fifth ground of objection, although containing a charge pointed at Mr. Smith only, does indirectly assail the conduct, not only of the arbitrator, Mr. Peckham, who it is stated was a partner in business of Mr. Hotchkiss, although not interested in the matters which have given rise to this arbitration, but also of Mr. Howland, the umpire, for these gentlemen could not possibly have sat by and permitted Mr. Smith to control the matters referred to in the manner which is imputed to him, without sharing in the guilt of whatever misconduct is properly attributable to him in respect of the matter complained of. The explanation, however, which is given of the transaction, satisfactorily shews that it is not susceptible of the colouring and complexion given to it by the applicant Hotchkiss, and that what was in fact done, so far from amounting to corruption or misconduct, cannot be characterised even as an irregularity or an error of judgment.

I have noticed that Mr. Peckham, one of the arbitrators, although not interested in the subject matter in dispute, is said to have been a partner in business of Mr. Hotchkiss. Mr. Smith, the other arbitrator, is sworn to have been selected as an arbitrator as being known throughout the Province as one of the most, if not the most extensive, experienced, honourable and fair man in the timber business in the whole Province. Now, so anxious do the parties, Hotchkiss and Hall, appear to have been to submit the matters in difference to the absolute uncontrolled judgment of these gentlemen, or in case they should differ of an umpire chosen by them, that in the agreement of reference they contract with each other as part of the terms upon which the submission to arbitration is made: "That the said parties are not at liberty to appear or be represented before the



said umpire or arbitrators or umpire by counsel, attorney, solicitor, or agent, but are to conduct the hearing of the said matters referred in person; but the said arbitrators or umpire may employ legal assistance in framing or drawing up their or his award when settled upon."

At the opening of the arbitration, Mr. Hotchkiss brought with him his book-keeper, a Mr. Hilborn, and he desired to be assisted by him in taking down the evidence. Hall, and not Mr. Smith the arbitrator, objected to this arrangement as contrary to the above terms of the agreement, and he claimed if the privilege should be granted to Mr. Hotchkiss that it should be granted to him also. Hall's objection was upheld. However, during the course of Hall's examination, which I understand to have been on the first day of the arbitration, it appearing that Mr. Hotchkiss, from some injury in his hand, could not take down his notes sufficiently well, the arbitrators, with Hall's consent, allowed him to avail himself of Hilborn's services, which he from thence did until the close of the arbitration, which lasted for seven days, although no similar privilege was granted to Hall. It is preposterous that a motion to set aside an award should be based on a transaction of this nature; and it is singular, that the person to complain is the one in whose favour his own agreement for submission to arbitration was released with the consent of his opponent.

With respect to the fourth objection, what I find, upon comparison of the affidavits, to be the facts in relation to the matter which is made the subject of this objection, is as follows:—Hall shipped the lumber which was the subject of dispute, after Hotchkiss refused to receive it, to one Peter Wood, at Chicago: the latter sold it to divers persons, and Hall being desirous of proving the quality of the lumber by Wood, and by the persons to whom he sold it, wrote to Wood to come over himself, and to bring some of the other parties with him. These parties, it would seem, being unwilling to come over, wrote letters to Wood approving of the lumber; these letters Wood transmitted to Hall, and he, before Wood arrived, appears to have desired to use the letters as evidence

before the arbitrators. This was objected to by Hotchkiss, and his objection prevailed, and the letters were not received in evidence or read; they had, however, been marked when first produced, and were laid aside unread. At a subsequent stage of the arbitration Wood was called as a witness to give his evidence, and during the course of his examination he referred to the letters, read them, and said he had received them from the parties to whom he sold the lumber. I do not find that Hotchkiss during Wood's examination objected to the letters being read by him, or to his making statements as to how he received them; on the contrary, I arrive at the conclusion that it is established that Hotchkiss cross-examined Wood upon these points, and that he had full opportunity then of seeing the letters, and that he heard them read; and from Hotchkiss's affidavit, and that of Hilborn, I gather that he elicited from Wood the fact that the letters were written by the parties in reference to this arbitration.

I have referred above to the apparent anxiety of the parties to submit their differences to the absolute judgment of the arbitrators, unaffected by the legal suggestions of counsel, attorneys or solicitors, with a view, as it would seem, of having their disputes settled by business men without the aid of lawyers; but whether or not the clause was inserted with a view of excluding legal objections to the decision of the arbitrators, it cannot be disputed at the present day that the decision of an arbitrator, whether lawyer or layman, is binding on the parties both in matters of law and in matters of fact, unless there has been fraud or corruption on his part, or there be some mistake of law apparent on the face of the award, or of some paper accompanying and forming part of the award. *Hodgkinson v. Fernie*, 3 C. B. N. S. 189; *Hogge v. Burgess*, 3 H. & N. 293; *Severn v. Cosgrave*, 2 U. C. L. J. N. S. 13; *Haigh v. Haigh*, 8 Jur. N. S. 983; *Hagger v. Baker*, 14 M. & W. 9, and many other cases put this point beyond a doubt. In *Hodgkinson v. Fernie*, Williams J., says, "Many cases have fully established that position where awards have been attempted to be set aside on the ground of the admission of an incompetent witness, or the rejection of a competent one."

In *Haigh v. Haigh*. 8 Jur. N. S., at page 984, that learned judge, Sir G. J. Turner, says : "An arbitrator being a judge selected by the parties, and chosen to decide without appeal, this court has nothing to do with any mere error in judgment on his part. The parties have chosen him to be their judge, and have agreed to abide by his determination, and by that determination, if fairly and properly made, they must be content to be bound ; but, on the other hand, arbitrators, like other judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice, and this court when called upon to review their proceedings is bound to see that those rules have been observed. The difficulty which the court has to encounter in determining a question of this nature, is not as to the principles by which its decisions ought to be governed, but *as to whether what has been done falls within the range of the arbitrators' judgment*, or contravenes the rule which ought to be observed in collecting the materials upon which that judgment is to be exercised."

Now, whether a witness be competent or incompetent is a question of law, which, however, falls within the range of an arbitrator's judgment, and his honest judgment on the point, though contrary to law, cannot be questioned. So likewise, whether these letters, referred to as they were by the witness Wood, became by the aid of his testimony admissible evidence, was a question of law, but one which fell within the range of the arbitrators' judgment, and their decision, though not in accordance with law, cannot be questioned ; and with a view to judge of their admissibility, it was necessary for the arbitrators to see their contents ; but the case is wholly defective in shewing that the letters were received as evidence, or that the arbitrators in any respect formed their award upon their contents. In *Hagger v. Baker*, 14 M. & W. 9, the admission of similar evidence was held to be no ground for setting aside an award. It may be that Wood referred to the letters simply to prove the truth of what he may have sworn to, namely, that the parties to whom the lumber was sold were

satisfied with it, and had so told him, and a proof of this allegation was afforded by the letters.

The case upon this head has been likened to *Hickman v. Lawson*, 8 Grant, 386, and *McEdward v. Gordon*, 12 Grant, 383; but *Hickman v. Lawson* proceeded upon the principle that the rules of natural justice had been violated in the arbitrators examining a witness for one of the parties in the absence of and without notice to the other. *McEdward v. Gordon* proceeded on the same principle. Mr. V. C. Spragge likened it to the case of *Walker v. Frobisher*, 6 Ves. 70, wherein the arbitrator acted in violation of natural justice in receiving evidence from one of the parties in the absence of the other, after he had given notice to both that he would receive no more, in which both acquiesced. In *McEdward v. Gordon* an affidavit of a witness upon one side, upon the most material point, was received against the urgent opposition of the other party to the award. Now that also was a plain violation of a rule of natural justice, that a party should not be examined as a witness without giving to the opposite side an opportunity of cross-examination, and here it has been urged that there is an agreement in the submission that "the witnesses on the reference, and the parties if examined, shall be examined on oath," and it is contended that the reception of the letters is in excess of the jurisdiction conferred by this clause; but this firstly assumes the letters to have been received as evidence of what may have been contained in them, which does not appear; and moreover, the clause, in my judgment, does not affect such a case as this; it is intended to provide for the examination of the witnesses being taken not only *vivâ voce* so as to permit of a cross-examination, but that such *vivâ voce* examination shall be taken only after the administration of an oath; and even in the case of the examination of a witness without oath, although there be such a clause as that above in the submission, all right to object may be expressly or impliedly waived by the acts and conduct of the parties: *Biggs v. Hansell*, 16 C. B. 572; *Allen v. Francis*, 9 Jur. 691. This latter case seems to be a strong authority that the objection,



if one of which in this case Hotchkiss could avail himself, was waived by him on his examining Wood, as I find that he did, upon the subject of the letters, and by his permitting them to be read, as I find he did, by Wood in his examination, without any objection *then* made to their being read. When the letters were read and referred to by Wood in his examination, and the purpose for which they were written was elicited from him, it became a matter, if the point was then raised by Hotchkiss, upon which the arbitrators had to exercise their judgment, whether the letters should be received or not for the purpose, whatever it may have been, for which they were referred to. Hotchkiss contended that they should have properly exercised that judgment by rejecting the letters; but there was no impropriety in looking at the letters, and that it was a matter calling for the exercise of their judgment is admitted. Now there is no evidence to lead to the conclusion that the arbitrators did not exercise that judgment by not receiving the letters as evidence, but the point being as I think it was, "within the range of their judgment," as expressed by Sir George Turner, and not a matter as to which their jurisdiction was fettered by the term in the reference as to the examination of witnesses upon oath, the award cannot be set aside for anything contained in the fourth objection.

It was urged by Mr. McCarthy, that Mr. Smith should be required himself to answer a passage in Hotchkiss's affidavit, the whole effect of which is to insinuate that under the pronoun *we*, said to have been repeatedly used by him during the arbitration, he meant himself and Hall, so as to impute to him corrupt and partial conduct;—but as I have already said, all pretext for imputing corruption and partiality is, in my judgment, wholly removed by the affidavits filed in answer; and I am of opinion that under the circumstances he may be excused for not having thought it necessary to explain that words which if used were naturally capable of a perfectly innocent interpretation and application, as having reference to himself and his co-arbitrators, were not meant to apply to himself and Hall, as insinuated by the unsuccessful party in the litigation.

Mr. McCarthy also asked leave to file affidavits in reply to the affidavits filed in answer to his application, but the points upon which he wished to reply are not, in my judgment, such as to entitle him to that privilege, and the rule for setting aside the award must be refused.

As to so much of the motion as asks that the rule made ordering payment of the amount of the award with the costs taxed in pursuance thereof should be rescinded, it is plain that this cannot be granted upon the grounds urged for setting aside the award, and which I consider to be insufficient for that purpose. Mr. McCarthy's argument was, that these objections could not have been shewn as cause against the granting of the rule; if so they cannot be entertained upon a motion to set aside the rule ordering payment. Then as to the objection stated in the motion paper, that the costs purporting to be taxed in pursuance of the award, were taxed irregularly by the Deputy Clerk of the Crown and Pleas for the County of Simcoe,—it is apparent that the applicant and his attorney have not placed much stress upon this as an objection, for nowhere in the affidavits filed on the motion is it stated where the costs were taxed; it was, it is true, stated in the argument, that they were taxed in the County of Simcoe, after notice given according to the ordinary practice, but there is no foundation whatever made in the affidavit for the objection, and in such case I do not think I can notice what was said in argument. However, I am not prepared to say that it was incompetent for the Deputy Clerk of the Crown and Pleas in the County of Simcoe to tax the costs. No case was cited to me to shew that he had no jurisdiction, and in view of the effectual appeal given in respect of and the control exercised over taxation by deputies by the 331st section of the Common Law Procedure Act, I do not at present see why the Deputy Clerk may not exercise his jurisdiction, in the absence of any special provision of law or decided case limiting his jurisdiction. But further, unless the applicant is prepared to establish that the taxation is a nullity, which I at present fail to see, this is an objection which could have been, and therefore should have been shewn as

cause against the making the rule absolute. For all these considerations I must refuse to set aside the rule, judgment, and execution, upon this ground,—leaving the complainant, if the costs taxed are excessive, to obtain a revision under the 331st section of the Common Law Procedure Act.

Where a party shews cause in the first instance, the general rule is not to give him costs if successful, but it seems this is not an inflexible rule, it is in the discretion of the court wholly to grant or refuse the costs, and the court will exercise that discretion by giving costs when the rule, if unopposed, would have operated as a stay of proceedings: *Blackburn v. Edwards*, 10 A. & E. 21; *Norris v. Carrington*, 16 C. B. N. S. 396.

In this case the applicant having made charges, as I think, without any foundation, I might perhaps properly subject him to payment of costs, but I shall adhere to what is considered the general rule. The rule therefore will simply be refused.

*Rule refused.*

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### WEST TORONTO ELECTION PETITION.

#### ARMSTRONG (*Petitioner*) v. CROOKS (*Respondent*).

*Controverted Parliamentary Elections—Particulars.*

Where particulars of alleged corrupt practices, &c., have been delivered under an order for that purpose, better particulars will not be ordered if those delivered substantially comply with the spirit of the order by giving all reasonable information.

Nor will better particulars be ordered even when the order is not complied with in furnishing certain details, provided the Judge to whom the application is made thinks these details unnecessary or unreasonable, nor unless the respondent can shew on affidavit that the want of such information will prejudice him in his defence.

*Semble*, that the powers of the Judge at the trial, as to amendment of the petition and particulars, and postponement of the trial, should be liberally exercised, so as to prevent a failure of justice to either party.

[CHAMBERS.—July 12, 1871.—RICHARDS, C. J.; HAGARTY, C. J., C. P.; MORRISON, J., and MOWAT, V. C., Judges on the *rota*.]

*Cattanach*, for the respondent, obtained a summons calling on the petitioner to shew cause why he should not give better and fuller particulars of the charges contained in the petition, and directed to be given by a Judge's order in that behalf.

*Harrison*, Q.C., shewed cause.

The particulars furnished are sufficient, and at least are the best we can give. The information must be obtained from those opposed to us, and we cannot be reasonably asked for more. The order for particulars was too strict in its terms, but we have complied with the spirit of it by giving all reasonable information.

*Cattanach, contra.*

The particulars furnished do not comply with the order made; and though the cause now shewn might have applied to the application for the order in the first instance, it is not an answer to the present application: *Bristol case*, 22 L. T. Rep., N. S. 729, and a note of *Nottingham Case*, in 47 L. T. 241. [RICHARDS, C. J., and HAGARTY C. J. C. P.—We will not hold parties rigorously to orders made, unless injustice will be done. We have not acted in the view you contend for; and if the order is too strict can we not remould it now?] The order as made must be followed, and the particulars ask very explicit answers, which are not complied with. [Counsel read the order and particulars, pointing out where the latter were in his opinion defective. MOWAT, V. C.—It really makes no matter, as the evidence would be heard by the Judge who may try the case. RICHARDS, C. J.—Admitting that the original order is more strict than we now think it should have been, the question is now whether you have not got all the particulars you can reasonably ask. We will carry out the spirit of the Act and rules, without regard to technicalities. HAGARTY, C. J. C. P.—Many of these orders were made before any practice was settled in this country in relation to them.] The practice in England and Ireland is in favour of our contention. See *Bradford Case*, 19 L. T. Rep. N. S. 723, 728, and the cases there referred to.

RICHARDS, C. J.—We will not defeat enquiries on any technical grounds, and we are not prepared to make any further order, unless Mr. Crooks can shew by affidavit that he will be prejudiced; nor do we think he will be prejudiced. If, at the trial, the contrary is shewn, the trial can be postponed, and there can be little difficulty or expense in a city



case : in a case tried in a country place, there might be some difference in this respect. If the particulars delivered are in reasonable compliance with the spirit of the order—and we think they are—we must hold that the order has been sufficiently complied with.

*Summons discharged.*

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### REGINA V. McNANEY.

*Con. Stat. U. C. cap. 76—29–30 Vic. cap. 45—Apprentice—Execution of contract—Amendment of return to certiorari.*

Upon an application under 29–30 Vic. cap. 45, for the discharge of a prisoner committed under the Apprentices and Minors Act for disobedience to his masters, on the ground, *inter alia*, that the indenture of apprenticeship was not a binding contract, it having been executed by one only of the employers, in the name of the firm :

*Held*, that the indenture must be considered to be sufficiently executed, as it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to shew that his co-partners had not been present and assented to the execution.

*Held*, also, that where a *certiorari* simply requires a return of the evidence, the magistrate need not return the conviction or a copy of it.

*Semble*, that if material evidence be given before a magistrate, but unintentionally omitted from such a return, an amendment may be allowed to supply it, but only with the concurrence of the parties, and of the witness by whom the deposition was signed, in the correctness of the additions, but it cannot be supplied by affidavit.

[CHAMBERS, July 27, 1871.—WILSON, J.]

*O'Donohoe* obtained a writ of *habeas corpus* to bring up the body of one Owen McNaney, who had been committed to the common gaol of the county of York, under the provisions of the Apprentices and Minors Act, Con. Stat. U. C. cap. 76, sec. 10, for disobedience to the orders of Messrs. Beard Brothers, his masters ; and also a writ of *certiorari*, directed to Alexander MacNabb, Police Magistrate for the City of Toronto, to send up the evidence had before him, and upon which the warrant of commitment had been founded.

Both writs having been returned, on the 26th July last, *O'Donohoe* moved for the discharge of the prisoner, under 29–30 Vic. cap. 45, on the grounds :

1. That there was no legal contract of service, as the indenture of apprenticeship was not signed by the prosecutors, and was therefore bad for want of mutuality: *Lees v. Whitcomb*, 5 Bing. 34.

2. That the contract, being signed by the employers under the name of "Beard Brothers," could not be properly executed by one partner alone without the production of a written authority under seal from the remaining partners: *Addison on Contracts* (Ed. 1869), 1052; *Gould et al. v. Barnes*, 3 Taunt. 504.

3. That even if the contract had once been binding, it was terminated by the change in or dissolution of the partnership which had taken place since its execution: *Brook v. Dawson*, 20 L. T. N. S. 611.

4. How and in what particulars the apprentice disobeyed the orders of his employers, must be stated: *Paley on Convictions*, 5th Ed., 210; *Colborne v. Stockdale*, 1 Str. 493.

5. That the commitment was bad, as no conviction appeared to have been made: *Rex v. Rhodes*, 4 T. R. 220; 32-33 Vic. 31, sec. 42.

*M. C. Cameron*, Q. C., opposed the discharge of the prisoner on the grounds:

1. That the *certiorari* did not require a return of the conviction, and therefore the fifth objection must fail.

2. That there was no return of any evidence shewing a dissolution or change of partnership, if any had taken place.

3. That there was a valid execution of the indenture of apprenticeship by the member of the firm who had actually signed it, and therefore a binding contract had existed between the parties.

He referred to *Ball v. Dunsterville*, 4 T. R. 313; and *Bowker et al., v. Burdekin* 11 M. & W. 128.

WILSON, J.—As to the evidence which it is said was given of the change in or dissolution of the firm of employers after the making of the articles of apprenticeship in question, I cannot of course act upon it as if it had in truth been given before the Police Magistrate, because no such

evidence has been returned by him, and there is no affidavit before myself stating that such evidence was given. It may probably have been given in fact before the Police Magistrate and he may have omitted to note it, either unintentionally or because he may have thought it at the time to have no particular bearing on the case. If the evidence were given, but not noted, I think the magistrate might be allowed to amend his return by setting it out as a part of the written evidence, if he remembered what it was, and if both parties concurred in the correctness of the addition. I am not quite clear that the magistrate can amend the notes from his own recollection after the evidence has been returned, but I am disposed to think he might be allowed to do so. It could be done only with the concurrence of the witness, if he had signed the deposition.

If the magistrate did not truly return the proceedings, he would be liable for making a false return. If he omitted to return some matter which he should have returned, I have no doubt he might be allowed to amend his return. Here he has returned truly all he intended, and all he had it in his power to return; and now it is suggested he might amend the evidence which he took by adding to it a fact which was deposed to, but which he did not note at the time. I think, as I have said, that may be done. I do not think the omitted evidence can be supplied by affidavit, though an affidavit is allowable in some cases, to shew what has actually occurred before the magistrate: *Re Thompson*, 6 H. & N. 193; *The Queen v. Bolton*, 1 Q. B. 66; *Ex parte Baker*, 3 Jur. N. S. 937.

I think the want of the conviction cannot be complained of, as the terms of the *certiorari* do not call for it. If the magistrate should have returned it, and had not done so, I should still allow him an opportunity of doing so; for no doubt there is such a proceeding. If he had already returned it to the Clerk of the Peace, he might shew that fact, or he might transmit a copy instead, stating why he could not return the original: *The King v. Eaton*, 2 T. R. 89.

This reduces the objections to the one relating to the mode of execution of the instrument of apprenticeship. The execution, though in that informal manner, is sufficient if all the partners were present at the time and assented to its being so executed: *Ball v. Dunsterville*, 4 T. R. 313.

In *Bowker et al. v. Burdekin*, 11 M. & W. 128, it was held that the partner who had executed an assignment of his goods and effects, though it was intended that his co-partners should also have joined in it, and they were named in it, passed his own estate, although his partners had not signed it.

It has been argued here that this instrument is binding in that view upon the partner who actually signed it, even if it be not binding on his co-partners, and so there is a valid contract with that partner. That partner, I presume, is bound; but whether the contract produced is therefore valid is another question.

The case referred to shews that the individual share of the partner would pass, so long as he delivered the deed as complete on his part, and not as an escrow. In this case the apprentice bargains for the partnership responsibility to him, and he has not got it unless all the partners were present and assented to the execution by their co-partner. The infant cannot therefore sue them, though he may sue the partner who executed the deed.

In some cases the question has been, whether a person who has not executed the deed can sue the one who has executed it. The rule seems to be, that in leases the lessor who has not executed, and who has not therefore conferred the estate on the other party contemplated and bargained for by him, cannot sue him for not repairing, or for non-payment of rent, or for any such cause, which assumes and is based upon an estate having been granted; but with respect to other covenants in the lease, not depending on the interest in the land, the covenantee may sue the covenantor though the covenantee has not executed the deed, and although the covenant sued on is stated to have been entered into in consideration of the covenants which the other should



have executed: *Pitman v. Woodbury*, 3 Exch. 4; *Morgan v. Pike*, 14 C. B. 473. See also *Millership v. Brookes*, 5 H. & N. 797, where the same point as to an apprentice was argued, but no judgment given on it.

I am not prepared to say that this indenture, though it had not been executed by the employers at all, would not have been binding on the apprentice, although he could not have sued upon it. He might, however, have compelled the master to execute it on a proper case for relief being made out: *Brown v. Banks*, 7 Jur. N. S. 1273. I cannot, therefore, give less effect to this indenture, which has been executed by one partner, and must therefore bind him, than if it had not been signed by any of the members. An agreement of this kind, if not beneficial to the infant, will not be binding on him: *The King v. Lord*, 12 Q. B. 757. But this agreement is just as beneficial to him as it would be to a person of full age.

It appears that notwithstanding this conviction, the party may be prosecuted a second time under the same agreement, if any further cause of complaint arise; but if the fact be, as has been stated, that the partnership in force at the time has been since dissolved, it may be of very little consequence to the prosecutors that the evidence on that point does not now appear on this return; for it will be sure to be brought out and noted on any future occasion, if that should unhappily arise.\* The case of *Brooke v. Dawson*, 20 L. T. N. S. 611, referred to by Mr. O'Donohoe on this point, I have not referred to, for the reason already given.

On the only exception which I have been at liberty to consider, I think the application fails; and that the prisoner must be remanded for the residue of his time of imprisonment.

*Application refused.*

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\* The point has since come before the Common Pleas in *The Queen v. Redden et al.* (M. T. 1871,) where the Court held that such dissolution having taken place, apprentices under indentures to the original firm could not now be indicted for conspiracy at the instance of the present partners.—  
REP.

IN THE MATTER OF HARRIET LOUISA ALLEN, A MARRIED WOMAN, OF MAUDE ALLEN, FREDERICK ALLEN, AND ETHEL ALLEN, INFANTS RESPECTIVELY UNDER THE AGE OF TWELVE YEARS ; AND OF THE STATUTE CONSOL. STAT. U. C. CH. 74.

*Custody of children*—*Con. Stat. U. C. Cap. 74.*

*Held*, on an application to rescind an *ex parte* order which gave to the mother and took from the father the custody of their children under the age of twelve years, under Con. Stat. U. C. cap. 74, that the facts and circumstances set out below shewed it to be for the general benefit and interest of the children that they should be withdrawn from the custody of the father and placed under that of the mother; the statute being unrestricted in its operation in all cases within its provisions, leaving the decision of each particular application in the discretion of the Court or a Judge, irrespective of the common law rights of the father. The learned Judge therefore declined to rescind the order made in favor of the mother.\*

[CHAMBERS, July 12 and August 20, 1869.—MORRISON, J.]

On the 3rd of July, 1869, upon reading the petition of Harriet Louisa Allen, and upon her *ex parte* application, under the provisions of Con. Stat. U. C., chap. 74, Mr. Justice Morrison granted an order upon her husband, William Cox Allen, for the delivery to the petitioner of Frederick Allen and Ethel Allen, two infants under the age of twelve years, to remain in her custody until they should respectively attain the age of twelve years, to be kept by her within the jurisdiction of the Court, and from time to time to send said children, if able to go, to visit and see their father, if he wished it. No order was made for the maintenance of the children by the father.

The petition, upon which the order was granted, set out that the petitioner was the wife of William Cox Allen, of Cornwall, physician, that she was living apart from her husband, he having forbidden her his house about six weeks before this: that she had three infant children, all under twelve years of age, namely, Maude, aged eight years, Frederick about six,

\* Dr. Allen appealed from this judgment to the Court of Queen's Bench, which eventually, in Easter Term, 1871, rescinded the order of the 3rd July (See report of the case in 31 U. C. R. 458). This judgment, and that in the next case of *Regina v. Allen*, were not therefore reported at the time, but are inserted now to complete the case.—REP.

and Ethel aged three years : that Maude, by consent of her husband, was living with her since their separation, but that her husband had the other two children under his own control : that if for no other reason than that he was Mayor of Cornwall, and so more or less occupied with public duties, he was quite incompetent and unfit to take the proper and necessary care of the said children, and that she was informed and believed that they were subject to various kinds of neglect, and that Ethel, being a delicate and sickly child, and her mother having no access to her, her health was greatly endangered : that being induced to believe that her husband would give up the two children, she delayed making the application ; but having reason to believe that he had no such intention her only hope of getting them was by aid of the Court ; and that she feared that her husband contemplated taking her daughter Maude, who was in a weakly state, away from her : that the children were all tenderly attached to her, and most anxious to be allowed to go and remain with her : that while so deprived of them and under fear of losing the one with her she was compelled to endure the utmost distress of mind and misery ; and she prayed that an order might be made upon her husband for the delivery of the children Frederick and Ethel, together with Maude, to her care and custody, &c.

The truth of the statements so set out was verified by the affidavit of the petitioner, and supported by the affidavit of her sister and another, and an order was thereupon made *ex parte*.

On the 7th July the order was served on Dr. Allen, and on the 12th July, *J. K. Kerr*, on his behalf, applied to the same learned Judge for a summons to rescind the order, and to stay proceedings on it, which was granted.

In support of this application Dr. Allen stated on affidavit, that on the 4th May last, Mrs. Allen at the assizes held at Cornwall, in a cause in which he was plaintiff and her father defendant, voluntarily appeared as a witness and swore that he, Dr. Allen, committed a certain gross offence, she knowing it to be untrue, and that she thereby

committed perjury; and that on account of her doing so, it was impossible that he and she could live together, and that he agreed to pay her board, and allowed her to keep the child Maude: that during the last two years she was in the habit of daily going to the houses of her father and other gentlemen in the neighbourhood, and on her return home telling her husband, in insulting terms, what those gentlemen had abusively said of him: that during the past year, on several occasions, Mrs. Allen had returned to his house late at night intoxicated, and he believed her to be addicted to the use of intoxicating liquors in excess; that ever since last fall she neglected her household duties, and was continually absent from his house and table, except during part of the night, leaving home usually about eleven in the forenoon, and not returning before six in the evening, when she took her tea in the kitchen, and then went out again and remained away until between nine and twelve o'clock at night, and on her returning after those hours would abuse him, calling him by offensive names and swearing at him: that the children were in good health, and not suffering from want of care: that he had ample time to take care of them: that while his wife was living with him the care of the children devolved upon him to a great extent, as their mother was almost always absent: that in coming home about nine o'clock, he often found his house deserted by his wife and servants, and his children taking refuge with the neighbours: that Mrs. Allen, on being remonstrated with, replied that she would do as she pleased; and that he had engaged a lady of mature age, competent to take charge of the children and his household matters.

Attached to his affidavit was a writing which he swore was a copy of an affirmation signed and made by Mrs. Allen of her own free will, in which she solemnly affirmed that the charge she made and swore to against her husband was wholly untrue, and without a shadow of foundation, and that she was forced to make it by the persuasions and threats of members of her family, "influenced by diabolical hatred



against her husband:" that she made the affirmation of her own accord, and that neither threats nor persuasions were used by her husband to procure it. Dr. Allen, however, owned that she had agreed to sign that paper before he would agree to receive her back, and that at the trial in May last she swore that she stole the original affirmation, and burnt it. From his affidavit it did not appear when this affirmation was signed, except that he stated it was after the second occasion she remained away from his house.

In support of the application were filed some twenty-two affidavits of various persons, of whom a number were servants who lived in his house, at various periods. They, among other matters, testify to Mrs. Allen being intemperate and addicted to the use of intoxicating drinks, want of attention to her duties, as a mother and wife, taking little or no care of her children or house, leaving her home during the day, remaining out late, coming home at very late hours, using improper and indecent language to her husband, and annoying and insulting him in various ways, &c., and testifying to Dr. Allen's care and attention to his children, and his kindness and great forbearance to his wife.

*M. R. VanKoughnet* shewed cause on behalf of Mrs. Allen, and filed over sixty affidavits denying the charges and allegations made by Dr. Allen and the affidavits filed. The purport of these, so far as material, appears in the judgment.

*Harrison, Q. C.*, and *J. K. Kerr* supported the summons.

The arguments of counsel and the cases cited being given at length in the report of this case on appeal to the full Court, (31 U. C. R. 458), it is not necessary to repeat them here.

MORRISON, J.—It is quite unnecessary to state the wretched details of the affidavits filed by the applicant, or make any further remarks as to them, except to say that on closely reading them they are far from being satisfactory, being couched in doubtful language, more particularly as to Mrs.

Allen's intemperate habits, and as to her being out at late hours; the terms used lead one, at first sight, to infer that Mrs. Allen was on the street for some immoral purpose, while not the slightest imputation is made directly against her virtue or chastity, and Dr. Allen's counsel very properly intimated that there was no ground for any such charge.

There is one affidavit which I feel it my duty to refer to, for the purpose of marking my condemnation of the filing of it by Dr. Allen; viz., that of his son, who is stated in the affidavit to be fifteen years old. It is unnecessary to refer to the charges and insinuations contained in it, or the obvious influence under which it was made. A father of a correct or proper mind would have spared the feelings of a child from casting base imputations on his mother—particularly in a case where, from the numerous affidavits filed, there was no need of so cruel an act.

From the case attempted to be made by Dr. Allen to support the application for setting aside my order, he accepted the burden of shewing that Mrs. Allen had committed perjury under the most revolting circumstances: that she was addicted to drinking, and was in the habit of using foul abusive, and profane language: that she grossly neglected her children, and was otherwise unfit to have the custody of her infant children; and, if the matters charged were not fully met in every particular, it would be my duty at once to set aside my order.

With regard to the charge of perjury, a charge which was only supported by Dr. Allen's affidavit, Mrs. Allen swears that what she swore to at the trial referred to was true, as to the commission of the alleged crime by Dr. Allen, and in connection with her testimony, the fact appears that she swore to that criminal charge, the affidavit being produced, about the time of its alleged commission, before the Judge of the County Court and another magistrate; and that it was her own deliberate act, which was corroborated by one of her brothers and the County Court Judge, and that no influence was used to induce her so to swear; and, in relation to that charge, was also read the

affidavit of Mr. Elliott. This gentleman, it appears, was then an intimate friend of Dr. Allen, and he was appointed to act as an arbitrator on the part of Dr. Allen, after these unfortunate differences had arisen between him and his wife. Mr. Elliott swears that in a conversation with Dr. Allen he alluded to the criminal charge which formed one of the subjects of the arbitration; and that Dr. Allen then admitted the charge. It also appeared that a deed of separation was prepared, and after due deliberation was signed by Dr. Allen, as well as by Mrs. Allen, her father and her brother, which deed recites that "unhappy differences had arisen and subsisted, &c., and by means of the same they had separated, and that such causes of separation were such as in England would call from the Ecclesiastical Courts there for a divorce *a mensâ et thoro*, and would justify the delivery of the children of the marriage to the mother, and the removal of them from the custody, &c., of the father, (which causes it is unnecessary here to specify)," and it is sworn to by one of her brothers, that among the "causes unnecessary to be specified" was the criminal charge referred to, and that he (her brother), charged Dr. Allen at that time with the crime, and that he did not venture to deny it.

On the whole, as to this accusation of perjury against Mrs. Allen, (an accusation which it seems to me Dr. Allen has needlessly introduced, and with what object such charge and the crime in question is set out I cannot conceive, except as a reason for the separation from his wife—a matter not in dispute), I may also assume this to be, although not so expressed in the argument, a reason why Mrs. Allen should not have the custody of his children. Be that as it may, he has thought proper to thrust it prominently forward; and as I am driven to form an opinion as to the charge, the conclusion I have arrived at is, that the charge of perjury against Mrs. Allen totally fails, and that if it were necessary for me to decide this application alone on the circumstances appearing in reference to this charge, and the counter charge against Dr. Allen, I would be justified in dismissing this summons.

As to the charges sworn to by Dr. Allen, that Mrs. Allen was addicted to the use of intoxicating liquors in excess, upon reading the affidavits filed, no doubt remains on my mind as to the falsity of that charge.

Then, with regard to the various other charges against Mrs. Allen, of disregard of her duties as a mother, the use of foul and profane language, and the other charges against her morality which are alleged in the numerous affidavits filed in support of this application (any of which charges, if well founded, or if I were not satisfied of their falsity, would render it my duty to rescind my order), I must first note a circumstance quite inconsistent with the position now taken by Dr. Allen, and that is, his voluntary agreement to permit Mrs. Allen to have the care and custody of his daughter Maude, a girl eight years of age.

Now, it strikes me that if Mrs. Allen was the depraved woman he now endeavours to shew, that, as a father, having any regard to the welfare and interests of his child, he would not have assented to her remaining in the custody of such a mother. I further notice the absence of any allegation that this daughter, while in the mother's sole custody, is not carefully or properly looked after; but, on the contrary, he swears that he never intended depriving her of the custody of the child, so long as his wife remained away from boarding with her father.

As to the merits of these charges, I have carefully read over all the affidavits on both sides, and a most disagreeable and painful task it was. I do not feel it necessary to note in detail the matters contained in these seventy or eighty affidavits. I can only say, when I contrast the affidavits filed by Dr. Allen with those filed on the part of his unfortunate wife, that the testimony produced on her part overwhelmingly predominates over that adduced on the part of her husband. The affidavits filed to repel the charges against Mrs. Allen are made by many of her domestic servants, and by persons holding the highest social position, living for many years in the same town and in the immediate neighbourhood of Mrs. Allen, two of them most worthy



and respected Ministers of the Gospel, and all of them having the most ample means and opportunities of knowing and noticing the daily conduct of Mrs. Allen, and of obtaining information and of forming an opinion as to her character, habits, and conduct. They all testify, in unusually strong and expressive language, as to the high, rare, and estimable qualities of Mrs. Allen's character, amidst all her unhappiness, in a religious and moral point of view ; as being most temperate and abstemious ; as a mother, most careful and attentive to her children, and as being most tenderly devoted and attached to them ; and they generally express their opinion, that under her charge they would receive the most affectionate attention and religious training ; while they express fears for the interest of the children, if left in the custody of Dr. Allen.

In addition, and to the same effect, there are filed the affidavits of her nearest relatives, such as her father, her sister, her three brothers, all intimately acquainted with her character and habits, and her inmost domestic life, and with all the unhappiness and privations she endured, and they all repel, in the most explicit manner, all the accusations against Mrs. Allen, setting out in painful detail the conduct of Dr. Allen, in his harsh, cruel and oppressive treatment of his wife. The consideration of this most distressing case discloses that this unfortunate lady, from the beginning of her married life until the separation from her husband, has been subjected to great cruelty, unhappiness, and misery ; and it is almost incredible that she could have lived for any time under the same roof with Dr. Allen ; and it is only explicable upon the ground which she herself swears to, and which is corroborated by the members of her family and others, that so strong were her affection and attachment for her children that rather than be separated from them, and be deprived of their society, she suffered, and patiently bore the cruel treatment and misery detailed in the affidavits.

On the merits of this application, I am therefore of opinion that I ought not to rescind my order, for as the case

now appears, it strongly supports the propriety of my having made it

I have now to consider whether any of the objections taken in point of law by Mr. Harrison should prevail. It was first urged that I should not have made the order *ex parte*. If there is anything in this objection, Dr. Allen cannot now avail himself of it, for he has had all the advantage he would have had, if called upon in the first instance to shew cause, by staying proceedings on my order, and affording him an opportunity of rescinding it on the merits, and of which he has availed himself.

It was also urged that the grounds set forth in the petition of Mrs. Allen were insufficient, and at all events were not true as shewn by the affidavits. As the case now stands, I see nothing in that objection.

The main and principal question raised was, whether I was authorized or justified in granting the order I did, and whether under the circumstances of the case, now disclosed, I ought not to grant this application.

At Common Law, no doubt, the father is entitled to the custody of his children; and were it not for the 8th and the following sections of Con. Stat. of U. C., chap. 74, I could not have entertained Mrs. Allen's application.

The 8th section enacts "that any of the Superior Courts of Law and Equity in Upper Canada, or any Judge of any such Courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, &c., and if such infant be within the age of twelve years, may make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such Court or Judge may direct," &c., and when I look at the preamble of the Act, 18 Vic. chap. 126, from which it was consolidated, I find it to say, "Whereas it is desirable that the law relating to the custody of infant children shall be so amended as to enable the Judges of the Superior Courts of Law and Equity in Upper Canada to give the custody of such children to their mother in certain cases."

The Legislature did not think it necessary or expedient to limit the authority of the Court or Judge to any particular cases, or to prevent any mother, except those against whom adultery has been established in an action of *crim. con.*, from applying for and obtaining the custody of her infant children, provided they were within the age of twelve years. In this case before me, the infants are of the respective ages of three and six years, and there is not the slightest imputation against the mother's virtue or chastity.

In my opinion the object and intention of our Legislature was not to restrict, as contended on the argument, the Court or Judge in any case where the children were under twelve, and the mother not within the 11th section, but to leave the Court or Judge untrammelled by any previous principle or practice of law or equity.

Our statute was apparently taken from the English Act, 2 & 3 Vic., cap. 54, but the preamble to our Act is more extended, and our Legislature gives the power to the Common Law Judges; and also a power not in the English Act, to make order for the maintenance of the children by the father. As to the object and construction of the English Act I refer to the case of *Warde v. Warde*, 2 Phil. 786, which was decided by Lord Chancellor Cottenham.

On the whole, after carefully considering the matters contained in the numerous affidavits, and all the circumstances attending this case, I have arrived at the conclusion that I ought not to grant this application, for, in my judgment, it is necessary for the interest and welfare of these children that they should be placed under the care and in the custody of their mother, under the conditions set out in my order of the 3rd July.

I may mention, that during the argument of the case Mr. Harrison asked for leave to file affidavits in reply to what he considered new matter introduced by the other side. I saw none having any bearing on the decision of the case, except certain allegations as to the commission of adultery by Dr. Allen. I then said it was not my intention to consider them; and in considering the case I have kept them

entirely out of view. All the other matters mentioned in the affidavits resulted from the case attempted to be made out by Dr. Allen.

The application is discharged.

*Summons discharged.*

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REGINA V. ALLEN.

*Custody of children—Disobedience of order—Contempt—Affidavits.*

An order was made for the delivery of infant children by the father to the mother. On an application to commit the father for contempt in not obeying this order it appeared that in his absence from home the children had been removed from his house, and taken to the United States by his son, aged fifteen. They denied collusion, the son saying that he acted without his father's knowledge or consent; but the father took no steps to bring the children back, and did not offer to do so if time were given him. To the demand made for the children, the father replied that they were not in his custody.

*Held*, that he was not excused from obeying the order, and was in contempt. Affidavits disingenuously drawn up, with a view of presenting inferences and giving color to the transactions to which they refer, inconsistent with the whole truth, even though true so far as they go, should be read with suspicion, and carry but little weight.

[CHAMBERS, August 23, 28, and September 4, 1869.—MORRISON, J.]

This was an application resulting from the order made in the last case.

The summons called on Dr. Allen to shew cause why he should not be committed for contempt, for disobedience of the said order, made herein by Mr. Justice Morrison on the 3rd of July last, for the delivery of his two infant children to their mother to remain in her custody, &c. This order was served, and a demand made for the children on the 7th July, which Dr. Allen did not obey.

On the 12th July, on the application of Dr. Allen's counsel, the same learned Judge granted him a summons and stayed all proceedings for contempt to afford him an opportunity of rescinding the above order, if he could shew good cause for doing so. That application, after argument, was discharged on the 20th of August, and on the 21st August (Saturday,) another demand was



made by one Sedgwick, at Cornwall, on Dr. Allen for the delivery of the children to the custody of their mother, when Dr. Allen replied that they were not in his custody.

On the 23rd August the present summons was granted, and was served on Dr. Allen on the following day; and on the 25th August it was enlarged at the instance of Dr. Allen until the 28th, when it was argued.

On the part of Dr. Allen was filed his own affidavit, sworn on the 24th August, which set out that he left home on Thursday, 19th August, for Montreal, intending to return the same evening, but did not do so until Friday; that on returning that evening he found the children absent, and that his son Edwin (a lad fifteen years old) had taken the children that afternoon or evening to some place unknown to him: that on the 23rd August he heard a rumor in the street that the children were in the State of New York: that he did not hear directly or indirectly from his children when they went or were taken away: that he had no part, directly or indirectly, in their going away or removal from his house; nor did he desire, advise, or procure, directly or indirectly, their removal; nor did he know that it was contemplated: that he was astonished when told that his son had taken them away, as he did not believe he would undertake their removal without his direction: that he did not know where they were, and had no reason to form any belief as to their present residence. He also stated that he could not safely go to the State of New York, as he was apprehensive an attempt might be made to arrest him for the forcible extradition of burglars some eighteen months ago: that he was only aware of the discharge of his application to rescind the order of 3rd July, on the evening of Friday, by a telegram at Montreal from his attorney, Mr. Bethune: that he had no communication, either directly or indirectly, with any person relative to the children, until he returned by the train in the evening, when he was informed by a person (not named) on the crossing down train, at Vaudreuil, that the children had been removed.

Isabella Adams, a servant of Dr. Allen, also testified that the children were taken away by Master Edwin Allen, and as far as she knew, Dr. Allen knew nothing about the removal.

There was an affidavit of the son, sworn to at Prescott on the 27th of August, before one Reynolds, a commissioner there, wherein he stated that on the Friday evening, of his own free will, and without any direction from his father, he took the children into the State of New York, where, at the date of the affidavit, they were: that the removal was effected without his father's knowledge or consent, the object being to prevent his mother from getting possession of them: that his father did not supply him with money, nor was it his father's money that took him away: that, as far as he was aware, his father did not know his then residence or where the children were then. It appeared from the affidavit that the children were taken to Massena, and removed from thence in consequence of the son seeing D. B. MacLennan, barrister, of Cornwall, there, who he believed was interested for his mother. He swore that his father had no knowledge of the whereabouts of the children: that he had had no communication with his father since he removed the children, and that his father did not know that he was making the affidavit: that he never heard his father propose or say anything about the removal of the children out of the jurisdiction of the Court, and that he was firmly of the belief that if he had proposed to his father to do so during his absence in Montreal, that he would have prevented it; and he stated that he was determined that the children should not return home to be given up.

*R. A. Harrison, Q. C., and J. K. Kerr, shewed cause.*

1. The affidavits and papers are not uniformly entitled. In one heading "chapter" is used, and in another "chap." and they are improperly entitled in the Court of Queen's Bench.

2. It is not shewn that Dr. Allen knew that Sedgwick, who served the order and made the demand for the children,

was the person named in the power of attorney for that purpose, or that he was informed of it; nor is it shewn that the Sedgwick who served the order was the person named in the power of attorney: see *France et al. v. Wright*, 3 Dowl. 325.

3. This summons is too general in its terms, and does not state the charge against the defendant for contempt with sufficient clearness. When the liberty of the subject is concerned the greatest strictness and particularity is required.

4. By the order of the 3rd July, the children were to be delivered "forthwith." This is not sufficient; a specified time should have been given for their delivery: *Malpass v. Mudd*, 3 H. & N. 246.

5. When the order was served the original papers were not exhibited—though true it may be that certain papers were shewn to Dr. Allen which were stated to be the originals, and would be exhibited if desired; but that is not sufficient, as they should have been opened and exhibited, whether Dr. Allen asked it or not: *Arch. Crown Prac.* 323; *Jackson v. Clark*, 13 Price 208; *Lush Prac.* 864.

6. This application should have been made to the Court, and not to a Judge in Chambers, who has no power to make an order for an attachment: 2 *Ch. Arch.* 12th ed. 1716; *Lush Prac.* 947, 955; *Arch. Crown Prac.* 319; *Baker v. Rye*, 1 Dowl. 689; *Re Turner*, 6 Dowl. 6; *Rex v. Faulkner*, 2 C. M. & R. 525; *Van Sandau v. Turner et al.*, 6 Q. B. 773.

7. The application not having been made to the Court, the powers of the Court cannot be invoked, and the process of contempt must be a committal under the hand of the Judge for the purpose of enforcing his order, (see sec. 10.) But there is no statute giving a Judge the power to grant what is now asked for.

8. No attachment can issue for contempt of a Judge's order. The order should have been made a rule of Court before the application for attachment: *Chilton v. Ellis*, 2 Cr. & M. 459; *Woollison v. Hodgson*, 3 Dowl. 178; *Chadwick v. Stricknell*, 10 W. R. 319; *Swinfen v. Swinfen*, 25

L. J. C. P. 303; *Hinchliffe v. Jones*, 4 Dowl. 86; *Plumb v. Miller*, 5 O. S. 484; *Swaine v. Stone*, 4 M. & Scott 584; *Wilson v. Northop*, 2 C. M. & R. 326; *Black v. Lowe*, 4 D. & L. 285; and see C. L. P. Act, sec. 186.

9. The onus of proving the contempt lies on the applicant. Dr. Allen is not in contempt unless it was within his power to comply with the order, and here it is shewn that he could not possibly have given up the children when demanded. The disobedience must have been wilful: *Cooke v. Tanswell*, 8 Taunt. 131; *Clare v. Blakesley*, 1 M. & G. 567; *Dodington v. Bailward*, 7 Sc. 740, 7 Dowl. 640; *Rex v. Sheriff of Kent*, 1 Marshall 289; *Barton v. Field*, 1 Moo. P. C. 273; *Netherwood v. Wilkinson*, 17 C. B. 226; *Dodington v. Hudson*, 1 Bing. 410; *Regina v. Vickery*, 12 Q. B. 478; *Kemp v. Neville*, 10 C. B. N. S. 533.

*M. R. VanKoughnet* supported the summons.

A Judge has power to enforce his order under the statute, (sec. 10) and the proceedings are regular. An attachment might have issued in the first instance without calling on defendant to shew cause: *Rex v. Jones*, 1 Strange 185; *Rex v. University of Cambridge*, 1 Strange 564.

The defendant has failed to comply with the order, and his answer is frivolous and evasive, and an attachment for contempt should therefore issue: 4 *Black. Com.* 287; 1 *Tidd's Prac.* 8th ed. 487. [*Harrison, Q.C.*—There was no order that defendant should keep the children until the applicant should demand them. MORRISON, J.—But there was an understanding that the children should not go out of his custody, otherwise I should not have stayed proceedings.] A fraud has been perpetrated upon the Court, and if this order for attachment goes, the children will be produced. The defendant has in effect defied the Court, and an attachment should issue: *Lodge v. Porthouse*, Loft's Rep. 338; *Birch v. Walsh*, 10 Ir. Eq. Rep. 93.

All the technical objections to these proceedings have been waived by the enlargement obtained by defendant.

*J. K. Kerr*, in reply. The objections raised are not technical in the sense that they can be waived by an enlarge-



ment, and the rule does not apply where the application is to deprive a man of his liberty. The view contended for would in this case work the greatest injustice.

MORRISON, J.—As to the various formal and technical objections taken in this matter, I am of opinion that I ought not to give effect to any of them. If Dr. Allen desired to rest his case upon those objections, he should have done so before enlarging this summons. When I look at the affidavit filed by Dr. Allen, it is clear he had the fullest knowledge of all the proceedings, grounds, and object of this application, and that nothing has taken place to mislead or embarrass him. I have, therefore, to consider the matter entirely on the merits.

Upon the affidavits filed I am asked to discharge his application, and to acquit Dr. Allen of contempt in disobeying my order of the 3rd of July. At the time when I granted and enlarged Dr. Allen's application to rescind that order, it was pressed upon me by Mrs. Allen's counsel to require security that the children should be forthcoming and not be removed from the jurisdiction, in the event of this application being discharged. I was then assured that they should remain at their home, and I acted on that assurance, otherwise I should have made special order as to their custody. It now appears that on the evening of the day I discharged the application, (that fact being telegraphed to Dr. Allen's solicitor at Cornwall, who telegraphed that evening to Dr. Allen in Montreal,) these children, of the ages of three and five years, about the same time are removed from Dr. Allen's house by his son, a lad of fifteen, and taken to the United States.

I cannot shut my eyes to the surrounding circumstances of this painful case, nor can I look upon them otherwise than with the utmost suspicion. I cannot understand a father, anxious about the welfare of his infant children, who, discovering on his way from Montreal that they were taken away, takes no steps whatever to find them, nor makes any attempt to have them brought home; and so little interest

does Dr. Allen, by his shewing, appear to evince, that all he knows about them is that he heard on the street—then three days after—that they were in the State of New York ! If afraid to go into that State after his children, could he not have sent some other person ? Mr. Maclellan could find them at Massena.

Dr. Allen can hardly think that I can be so far imposed upon as to believe that these children were then, or ever were, in fact, really out of his power or control, nor does he attempt to swear in fact that they were. Dr. Allen, and whoever drew his affidavit, knew full well the nature and object of this application, and that Dr. Allen was bound by every regard for his character, as well as regard for truth, to give the fullest explanation and satisfaction as to the alleged abduction of his children, and that he should shew that he used his utmost diligence to bring them within the jurisdiction of the Court, or a readiness to do so ; but in his affidavit all this is studiously avoided. He swears that he did not desire or advise the removal, but he does not negative his knowledge of who did so. It is true, he negatives knowledge where the children were taken to, or where they were when he made his affidavit on the 24th of August ; but he does not state that he took any means to ascertain the facts, or that he made any inquiry, although the case was heard on the 28th, and his son made an affidavit on the 27th.

No further affidavit is made by Dr. Allen. He does not shew that he has taken, or will take any steps to have them brought back, or that he intends to do so, nor does he make any offer to do so, if time should be allowed him. Every act or thing necessary to be done for the discovery and return of the children appears to be carefully avoided, and, in addition, we have this lad of fifteen, who by some means or other is advised of this matter, and appears at Prescott on the 27th of August, the day before that to which this application was enlarged, and then swears to the affidavit filed—an affidavit evidently drawn up by some solicitor cognizant of this application, for it is regularly styled in the matter, with a

view of corroborating Dr. Allen's affidavit, and meeting this application, and is made use of for that purpose.

I shall make no comment upon the boy's affidavit, and the contempt he has committed and sworn to. I will, however, make this remark with regard to the affidavits filed by Dr. Allen;—that they are, in my opinion, disingenuously drawn, with a view of presenting inferences, and giving color to the transactions they refer to, inconsistent with the whole truth.

Mr. Chitty, in his *General Practice*, 3rd ed., vol. iii., p. 445, says: "Unquestionably, in practice, great skill may be evinced in preparing affidavits strictly according with the truth; but the least improper perversion, even of language, to make a better case for a client than the facts will warrant is morally, if not legally, an offence very little less than subornation of perjury."

After a full consideration of all the circumstances, I have arrived at the conclusion that Dr. Allen has not met this application; for it appears to me that the removal of these children was the result of a predetermination, a tacit understanding with others, that in the event of Dr. Allen's previous application to rescind my order being discharged, the children should, in some way, be removed without the jurisdiction, and my order rendered inoperative; and that Dr. Allen availed himself of, and acquiesced in these contemptuous proceedings, and made himself a party to them, and so perverted the ends of justice.

If I were to hold that in this case Dr. Allen has made out an excuse to protect him from process of contempt, by shewing that his young son took away the infant children, he, the father, making no effort to find them, but merely saying they were not in his custody, I cannot conceive any case under this statute that could not be evaded in like manner.

It was the duty of Dr. Allen, under the circumstances, to have these children forthcoming at all hazards; and if his son abducted them, as alleged, to have taken immediate steps for their recovery, and if he required time for that

purpose I should have granted it; but he takes no steps, nor does he offer in his affidavit, or instruct his counsel to state, that if time were afforded him, he would take such steps; and I have little doubt that if Dr. Allen had used any diligence, which, irrespective of the order, his own natural feelings should have prompted him to do, if the children were taken away against his desire, he would have had little trouble in obtaining the return of the children, and avoiding the effect of this application.

The order will go for the committal of Dr. Allen for contempt.

*Order for attachment.*

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ARMSTRONG V. MONTGOMERY.

*Security for costs—Ejectment Act, sec. 76.*

*Held*, that the mere fact of a second action of ejectment being brought between the same parties, and for the same land, is no reason for ordering security for costs, if the costs of the first action have been paid, and the second action brought in good faith.

[CHAMBERS, September 18, 1871.—MR. DALTON.]

*Ejectment.* The plaintiff had brought a former action of ejectment against the same defendant for the recovery of the same premises, but failed, owing, as he alleged, to some defect in the evidence then adduced. Having paid the costs of the former action, he commenced the present one, claiming under two additional modes of title.

The defendant applied, under sec. 76 of the Ejectment Act, for security for costs.

*Osler* shewed cause :

This case does not come within the Act, and in the discretion of the Judge security should not be ordered. There is no pretence that this second action is vexatious.

Mr. Strathy (Cameron and McMichael), *contra*, relied on Con. Stat. U. C. ch. 27, sec. 76.

MR. DALTON.—I do not find any authority for saying that the mere fact of a second action of ejectment being



brought after a previous unsuccessful one between the same parties, is a reason for ordering security for costs, when the costs of the first action have been paid; and I cannot see any cause for it, when there is no reason to suppose that the second action is brought otherwise than in good faith to assert the plaintiff's right to the land.

*Summons discharged.*

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COLVILLE V. JOHNSTON.

*C. L. P. Act, secs. 184, 188—Right to cross-examine.*

On an examination of a witness, under C. L. P. Act, secs. 184, 188, his evidence will not be read if the right of cross-examination has been denied.

[CHAMBERS, September 18, 1871.—MR. DALTON.]

It was charged, in this suit, that there was a collusive settlement between the parties, to deprive the attorney for the plaintiff of his costs; and the plaintiff's attorney asked for an order on the defendants for his costs, &c.

The plaintiff's attorney desiring to obtain, for the purposes of this application, the evidence of a witness who refused to make an affidavit of certain facts, had him examined under an order pursuant to C. L. P. Act, secs. 184, 188. After the witness had been examined in chief, the defendant expressed his desire to cross-examine him; to this the plaintiff's attorney objected, on the ground that there was no right of cross-examination in such a case; and the objection was upheld by the County Judge before whom the examination was held.

The report of this examination being tendered as evidence on the present application,

*Spencer*, for the defendant, objected to it on the ground that the defendant had not been allowed to cross-examine the witness.

*Holmested*, *contra*.

MR. DALTON.—I must decline to read the evidence, for the reason given. I think the defendant had a right to cross-examine the witness; and I cannot read the evidence until he has had an opportunity of doing so.

## GARDINER V. GRAHAM.

*Security for costs—Next friend.*

Where a plaintiff sues with her brother-in-law, with whom she lives, as next friend, he will not be ordered to give security for costs, even though there is a doubt as to his solvency.

[CHAMBERS, October 4, 1871.—MR. DALTON.]

Rachel Gardiner, the plaintiff, an infant, by Alonzo Richardson, her next friend, who was her brother-in-law, sued the defendant for breach of promise of marriage.

The defendant obtained a summons calling on the plaintiff by her next friend, her attorney or agent, to shew cause why the rule of Court admitting Alonzo Richardson to prosecute this action as the next friend of the plaintiff should not be set aside with costs, on the ground that he was an irresponsible person, and another next friend appointed; or why all proceedings should not be stayed until the said Alonzo Richardson should give sufficient security for the costs.

Contradictory affidavits were filed as to the solvency of the next friend.

*J. K. Kerr* shewed cause :

The next friend is not only the brother-in-law of the plaintiff, but she is living with him as one of his family, and he is, at present at least, her natural guardian. *Morris v. Leslie*, 5 C. L. J. N. S. 318, is an authority in my favor, and *German v. Elliott*, 2 C. L. J. N. S. 267, is distinguishable. There is no evidence of insolvency, even if that would be sufficient to uphold this summons: *Yarworth v. Mitchell*, 2 D. & R. 423.

*W. S. Smith*, contra :

The case of *German v. Elliott* governs here. The next friend not being, as the defendant contends, a responsible person, should give security for costs.

MR. DALTON.—I quite agree that this man is a proper person to represent the plaintiff as her next friend, without giving the security asked for, and I should think this, even

if the application were not answered on the merits, which I think it is. *German v. Elliott*, so far as it applies, is against the contention of the defendant.

The summons must be discharged—costs to be costs in the cause to the plaintiff.

*Summons discharged.*

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HALL V. BRIGHAM.

*Security for costs—State of cause.*

On applications for security for costs the state of the cause should be shewn on affidavit; but, to supply a defect in this respect, a Judge may, in his discretion, look at the records of the Court.

[CHAMBERS, October 4, 1871.—MR. DALTON.]

Summons for security for costs. The state of the cause was not shewn on affidavit, but appeared on the papers filed in Court, and produced in Chambers at the request of the defendant.

*J. K. Kerr* shewed cause, and took the preliminary objection that the affidavits filed on the application did not shew the state of the cause, it not appearing whether an appearance had been entered, or whether issue was joined. He cited *Huntley v. Bulwer et al.*, 6 Dowl. 633; *De la Preuve v. Duc de Biron*, 4 T. R. 697; *Torrance v. Gross*, 2 Prac. Rep. 55; *O'Reilly v. Vanevery et al.*, 2 Prac. Rep. 184; *Harr. C. L. P. Act*, 633; Rule 23.

MR. DALTON.—There seems to be some doubt as to the practice of shewing the state of the cause. I shall not, therefore, under the circumstances give effect to this objection. My conclusion is, that it should be shewn by affidavit; but the case of *Craven v. Smith*, L. R. 4 Ex. 146, decides that the Court may look at its own records; and knowing, as I do, from the papers filed, and now produced to me, the state of the cause, I think that they supply the information which the affidavit should have given. This information should, as a matter of practice, be always supplied by affidavit.

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## BAIN V. MCKAY.

*Particulars—Fraud.*

Particulars will be ordered of the fraud charged in a plea to a declaration alleging the breach of an agreement. It is sufficient if the affidavit on which the application is founded is made by the attorney on record.

[CHAMBERS, October 27, 1871.—MR. DALTON.]

The declaration in this action contained a count alleging the breach of an agreement in writing by a landlord, to do certain work to the house occupied by his tenant. The defendant pleaded that he was induced to make the alleged promise by the fraud of the plaintiff. The plaintiff thereupon obtained a summons, calling on the defendant to shew cause why he should not deliver particulars of the fraud charged by the defendant.

The only affidavit filed on the application was that of the plaintiff's attorney, wherein he swore, "I am not aware of there having been any fraud made use of in obtaining the promise of the defendant declared on, and my client, the plaintiff, instructs me that none was used for such or any other purpose relative to this action."

The defendant stated in his affidavit in reply, that it would be prejudicial to his case to give the particulars asked, and that an improper use would be made of the information given.

*O'Brien* shewed cause :

The only affidavit is that of the attorney for the plaintiff, and his statement is insufficient. The plaintiff should himself deny the fraud. The case of *McCreight v. Stevens*, 1 H. & C. 454, seems to be the authority for this application, and there, though the facts were peculiar, the affidavit was stronger than that now filed. Particulars should only be ordered where the reasonableness or necessity for the order is shewn. If there is any truth in the plea, the plaintiff knows as much about it as the defendant. If not, then plaintiff has nothing to fear.

*Spencer* supported the summons :



It is now the general rule to grant applications for particulars of fraud: B. & L. Prec. 445. In Chancery the defendant would be obliged to specify the fraud, and the order is necessary for the plaintiff's protection.

MR. DALTON.—The order must go for particulars of the fraud charged in the plea. The practice is in favour of these applications. I think an affidavit made by the attorney on record, is sufficient.

*Order for particulars.*

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YEOMAN V. CHESLEY B. STEINER AND ANSON STEINER.

*Jurat—Style of cause—Irregularity.*

A jurat stating the affidavit to have been sworn "at Toronto," without giving the name of a county, *held* sufficient.

Where in ejectment a landlord is allowed to come in and defend, the order not saying whether it is instead of or in addition to the original defendant, it is irregular to omit the name of the latter in the style of the cause.

[CHAMBERS, October 28, 1871.—MR. DALTON.]

Ejectment against Chesley B. Steiner. Anson Steiner was allowed by Judge's order to appear to the action, as landlord of the present defendant, and to defend for the property claimed; but the order did not say whether the landlord was to defend instead of or in addition to the tenant.

The plaintiff gave notice of trial, but the style of cause in the notice made no mention of the original defendant, Chesley B. Steiner. On this ground a summons was obtained to set it aside as irregular.

Mr. Ermatinger (Read and Keefer) shewed cause, and made a preliminary objection to the affidavit on which the motion was based, in that the jurat was defective in not stating the county where the oath was taken. The jurat was as follows: "Sworn before me at Toronto, this 26th October, 1871. Samuel B. Clark, a Commissioner, &c."

As to the alleged irregularity in the notice of trial, he cited *D'Arcy v. White et al.*, 24 U. C. R. 570; *Peebles et al. v. Lottridge et al.*, 19 U. C. R. 628.

*Spencer, contra.* As to the form of the jurat, it is a common practice to draw them in the same manner as this one. For all that appears it may be Toronto township that is meant, and the township would be judically recognized.

The notice of trial is irregular on the authority of *Haskins v. Gannon et al.*, 2 Prac. Rep. 334; *Jones v. Seaton*, 26 U. C. R. 166. It will be presumed that the name of the tenant was intended to be retained as a defendant.

*J. K. Kerr, amicus curiæ.* A jurat similar to the one under discussion was used in an affidavit in the case of *Gray v. Brown* (not reported), and was objected to on the same ground, but after full argument it was held sufficient by the Court of Common Pleas.

MR. DALTON.—As to the first objection, though the point seems arguable, I must hold the affidavit regular; but the notice of trial is irregular in not giving the names of both defendants, and must be set aside with costs.

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IN THE MATTER OF A SUIT IN THE FIRST DIVISION COURT  
OF THE COUNTY OF HURON, BETWEEN WILLIAM McLEAN,  
PRIMARY CREDITOR, MURDOCH McLEOD, PRIMARY  
DEBTOR, AND DANIEL McLEOD, GARNISHEE.

*Division Courts—Garnishment proceedings—New trial—Prohibition.*

*Held.* that under 32 Vic., cap. 23 O., a Judge of a Division Court has power in garnishment proceedings, when the justice of the case requires it, to grant a new trial after the lapse of fourteen days, notwithstanding Con. Stat. U. C., cap. 19, sec. 107.] Where the Judge has jurisdiction over the subject matter of a suit, prohibition will not go for irregularities in mere matters of practice

[CHAMBERS, November 18, 1871.—HAGARTY, C. J., C. P.]

On the 5th September, 1871, a summons requiring the primary debtor to answer the primary creditor's claim for a debt amounting to \$82.09, and requiring the garnishee to

shew cause why the debt owing from the garnishee should not be paid and applied to satisfy the said claim of the primary creditor, was issued out of the Division Court; and on the same day, the primary debtor and the garnishee were personally served with a copy of the said summons and particulars of claim.

On the 9th October, 1871, at the sittings of the Court, the County Judge made the following adjudication: "Judgment for plaintiff for \$82.09 debt, and \$4.05 for costs, to be paid in fifteen days; and it is adjudged that the garnishee is indebted to the primary debtor in a sum equal to the first above-mentioned two sums, and ought to be applied towards satisfaction thereof, and it is ordered that plaintiff may have execution against the said garnishee unless he shall sooner pay."

On the 26th October, 1871, the garnishee applied to set aside this judgment, and filed in the office of the Division Court the affidavits of the primary debtor, the garnishee, Malcolm Colin Cameron, and Alexander Duncan Cameron, and accounted for the delay in the application. The next day the Judge ordered: "that the said judgment against the garnishee be set aside, and that the garnishee be allowed to come in and defend at the next sittings of the Court."

The primary creditor thereupon applied for a writ of prohibition, to prohibit Secker Brough, Esq., the Judge of the Division Court, from giving effect to the above order; and from in any wise hindering or preventing the said William McLean from having execution against the said Murdoch McLeod, or the said Daniel McLeod, or both of them, to enforce his judgment already obtained in said Division Court against Murdoch McLeod as primary debtor, and Daniel McLeod as garnishee, on the grounds that the said Judge had no power or authority to make such order, and that such order was not made within fourteen days after the trial had in said Division Court cause, and that there is no law to uphold such order granting a new trial, the same having been made more than fourteen days after the trial and final adjudication had in such Division Court cause, and

that no grounds whatever exist for staying proceedings against Murdoch McLeod and Daniel McLeod, or for setting aside the said adjudication.

*W. Sidney Smith* shewed cause.

*Delamere, contra.*

HAGARTY, C. J., C. P.—In a matter admitted to be fully within his jurisdiction, the learned Judge of the County Court made the usual order for the garnishee to pay over, with an award of execution. The garnishee, although duly served, did not appear; and, for reasons satisfactorily shewn, did not apply for relief till over fourteen days after the decision against him. There is the strongest ground for believing that he is acting *bonâ fide*, and unless relief be given a serious injustice may be perpetrated.

It is now urged that after the lapse of fourteen days it is beyond the Judge's power to grant relief, and that sec. 107 of the Division Courts' Act (Con. Stat. U. C., cap. 19) is peremptory, that a new trial can only be granted on an application made within fourteen days after the trial.

It does not seem to me that I am forced so to limit the authority to grant relief. The Ontario Act 32 Vic., cap. 23, which creates this garnishment proceeding, seems to confer large powers on the Judge to prevent injustice.

Sec. 16 allows him to postpone or adjourn the hearing and other proceedings in all garnishee cases, to allow time for giving omitted notices of defence, or to produce further evidence *or for any other purpose, &c.*, as justice shall require. Sec. 14 allows parties interested in any attached debt to apply at any time before actual payment, to have the debt discharged from the primary creditor's claim. Again, in the same act which allows judgment in a specially endorsed writ, sec. 2 allows the Judge to set aside the judgment, and permit the case to be tried, on sufficient grounds shewn, &c.

It is argued that the Judge can do nothing under the Act except he strictly follow its provisions, that he has no general powers to set aside a judgment or give relief, as the Superior



Courts may do, and that his relief can only be given within the time prescribed.

I hardly think the rule is so unjust. He can, of course, only obtain jurisdiction over the subject matter of the case, and the case itself, to the extent allowed by the Act; but I am not prepared to hold that having the jurisdiction, and having the suit rightly before him, that any direction as to the number of days notice, failures to attend on notice, and the practical matters in the conduct of the suit must be always literally adhered to on pain of prohibition from a Superior Court.

In the case of *Mayor of London v. Cox*, L. R., 2 H. L. 252, a most elaborate judgment is delivered by Willes, J., explaining almost the whole law as to prohibition. At page 276 it is said, "When there is jurisdiction over the subject-matter prohibition will not go for mere irregularity in the proceedings."

If the argument be pressed to its full consequences, the result would be to give an appeal in many points of practice in the conduct of Division Court suits,—in every matter, in short, in which a party fancied that the Judge did not follow the precise directions of the Act in the various stages of the suit. The Act must be followed, of course, to give jurisdiction; but jurisdiction once fully given, it does not follow, I think, that there is a complete want of jurisdiction because there may not be a literal compliance with everything relating to time, numbers, hours of business, &c., in the progress of a suit.

But I think the whole tenor of the Ontario Act is such that the Judge is enabled to grant relief in these garnishment proceedings up to the actual payment over of the money, and that his action in the case before me is lawful as well as most just.

I think relief would be given in such a case in the Superior Courts; and I observe that sec. 69 of the Division Courts Act, which is to be read with the Ontario Act, provides that "In any case not expressly provided for by this Act or by existing rules, or by rules made under this Act, the County

Judges may in their discretion adopt and apply the general principles of practice in the Superior Courts of Common Law, to actions and proceedings in the Division Courts."

*Summons for Prohibition discharged.*

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BAIN V. MCKAY.

*Pleading—Declaration in trover.*

It is incorrect in a declaration in trover to allege that the defendant converted to his own use *or* wrongfully deprived the plaintiff, &c. (which is the form used in Bullen & Leake's Prec., 2nd ed., p. 253).

[CHAMBERS, December 27, 1871.—MR. DALTON.]

The plaintiff, in his declaration, inserted a count in trover alleging that the defendant converted to his own use, *or* wrongfully deprived the plaintiff of the use and possession of certain goods. The defendant thereupon obtained a summons to strike out the count as embarrassing.

*J. H. Macdonald* shewed cause, and referred to the form given in Bullen & Leake's Prec., as an authority in his favor.

*O'Brien*, contra :

The count is not in accordance with the form given in our C. L. P. Act, which must be followed. There is an evident mistake in the form given in Bullen & Leake: see Day's C. L. P. Act, 185, and cases there cited. The alternative form is clearly wrong, although it may perhaps be correct to use the conjunctive, as in *Hatch v. Holland et al.*, 28 U. C. R. 213.

MR. DALTON.—It seems to me that the two forms of expression mean the same thing, but the form given in our C. L. P. Act is explicit enough to shew that the form of words used must not be left in uncertainty. It may probably not be incorrect to join the allegations in the same count, as is commonly done. The plaintiff must amend, or the count must be struck out.

*Order to amend.*



# A DIGEST

OF THE

## CASES REPORTED IN THIS VOLUME.

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### ABATEMENT.

See PLEADING, 2, 3.

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### ACCOMPLICE.

See EVIDENCE, 2.

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### ADMIRALTY JURISDICTION.

*Jurisdiction of magistrates on the great lakes of Canada.*—*Held*, that the great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and therefore any magistrate of this province has authority to enquire into offences committed on said lakes, although in American waters.—*The Queen v. Albert Sharp*, 135.

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### AFFIDAVIT.

1. *Sworn as of day not arrived.*—The *jurat* of an affidavit stated that it was sworn on a day which had not then arrived. *Held*, that the affidavit was defective and a nullity.—*In re Robertson et al.*, 132.

2. *Interlineation.*—An interlineation in an affidavit, not noted by the commissioner, does not necessarily avoid it.—*Leeming v. Marshall*, 276.

3. *Disingenuously drawn.*—Affidavits disingenuously drawn up, with a view of presenting inferences and giving color to the transactions to which they refer, inconsistent with the whole truth, even though true so far as they go, should be read with suspicion, and carry but little weight.—*Regina v. Allen*, 453.

4. *Jurat.*—A jurat stating the affidavit to have been sworn “at Toronto,” without giving the name of a county, *held* sufficient.—*Yeoman v. Steiner et al.*, 466.

*Form of, for writ of attachment under Insolvent Act.*—See INSOLVENCY 1.

*Entitling of.*—See ARREST, 3, 4—ATTACHMENT.

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### AFFIDAVIT OF DANGER.

See EXTENT.



## AGENT.

See ATTORNEY, 2.

## AMENDMENT.

*Return by magistrate.*—Under what circumstances a return by a magistrate to a *certiorari* may be amended. — *Regina v. McNaney*, 438.

*Of return to fi. fa.*—See EXECUTION, 1.

## APPEAL.

*From conviction for selling liquor without license.*—See CERTIORARI, 3.

*From award of fence viewers.*—See FENCE VIEWERS 1.

## APPEARANCE.

*For infant.*—See INFANTS, 5.

## APPRENTICE.

*Disobedience to master—Execution of contract.*—Upon an application under 29-30 Vic. cap, 45, for the discharge of a prisoner committed under the Apprentices and Minors Act for disobedience to his masters, on the ground, *inter alia*, that the indenture of apprenticeship was not a binding contract, it having been executed by only one of the employers, in the name of the firm:

*Held*, that the indenture must be considered to be sufficiently executed, as it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to shew that his co-partners had not been present and assented to the execution.—*Regina v. McNaney*, 438.

## ARBITRATION AND AWARD.

1. *Enlarging time for making award.*—An arbitrator having failed, owing to the loss of the papers in the cause, in making his award within the time limited, a Judge extended the time under Con. Stat. U. C. cap. 22, sec. 172.—*Johnston v. Anglin*, 62.

2. *Notice of meetings—Proceeding ex parte—Duties of arbitrator and dominus litis—Costs.*—*Held*, that before an arbitrator determines upon proceeding *ex parte*, he should satisfy himself by proper evidence that necessary notice of the appointment has been served, so as to enable the party notified to appear, and, in case of non-appearance, it should be clearly shewn that such absence is wilful; nor should the arbitration proceed *ex parte* unless the notice conveys the information that *ex parte* proceedings will be taken if the party served does not attend, nor should the arbitrator so proceed if a reasonable excuse is given for such non-attendance.

That the party acting in the prosecution of the arbitration ought to take care that all proper notices are served on the opposite party, and should be able to shew, if he desires to proceed *ex parte*, that the other party has been properly notified, and that he wilfully absents himself.

A party, therefore, who had not fulfilled his duty in this respect, was ordered to pay costs, and the case was referred back.—*In re Potter and Knapp*, 197.

3. *Reference back—Mistake.*—An arbitrator, as appeared from his minutes taken on the arbitration and other evidence, having miscon-

ceived certain facts, and misunderstanding some alleged admissions by counsel, whereby he awarded differently from what he otherwise would have done, the award was referred back to him for reconsideration and re-determination as to the particular item affected by this mistake, with special directions as to costs.—*Clancy v. Clancy*, 109.

4. *Setting aside—Shewing cause to rule—Misconduct of arbitrator—Reception of improper evidence.*—On an application to set aside an award for misconduct of arbitrators, the facts relied upon to establish charges of partiality and unfairness on the part of an arbitrator must be clearly averred.

*Quære*, as to the right on such application to shew cause on the last day of Term.

The decision of an arbitrator being binding on the parties in matters of law as well as in fact, an award will not be set aside because letters are put in as evidence by one of the parties which are not legal evidence, if the circumstances and the conduct of the arbitrators are consistent with the supposition that they only read the letters for the purpose of judging of their admissibility as evidence, and it not appearing that they actually received them as evidence.—*In the matter of arbitration between Lewis Hotchkiss and William Hall*, 423.

5. *Taxation of costs by deputy clerk of Crown.*—A taxation by a deputy clerk of the Crown of costs under an award, on a reference to arbitration of two causes in different courts, together with all matters in difference, is not a nullity, as being beyond his jurisdiction, and probably not even an irregularity.—*Ib.*

6. *Staying proceedings, C. L. P. Act sec. 167—Insurance—Reference under condition in policy—Staying proceedings.*—By a condition endorsed on a policy of insurance the Company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators.

An action having been brought on the policy, and an application made under C. L. P. Act, sec. 167, to stay proceedings:

*Held*, That the arbitration intended by the condition was not merely a valuation.

That the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute.

*Per Mr. Dalton*—That the plaintiff was a “party” within the meaning of that section.

Proceedings were accordingly stayed.—*McInnes et al. v. Western Assurance Co.* 242.

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## ARBITRATOR.

*See* ARBITRATION AND AWARD.

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## ARREST.

1. *Setting aside—Discretion of County Judge.*—A Judge of a Superior Court will not interfere where the County Court Judge has exercised his discretion.—*Molloy v. Shaw*, 250 [and see next case].

2. *Capias—Setting aside order to arrest—Discharge of prisoner—Relative powers of Court and Judge—C. S. U. C. c. 22, s. 31; c. 24, s. 5.*—Applications having been made to

set aside two orders for arrest, with the writs and subsequent proceedings, on the ground that the affidavit to hold to bail in one case was untrue and insufficient, and in the other case was not entitled in any Court, and was insufficient in substance, and because there was a variance between the original writ and the copy served :

*Held*, that a Judge in Chambers has no power to set aside an order to arrest, though he may, on hearing both parties, discharge the prisoner, or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order, for irregularity in this respect.

The variance between the writ and copy was corrected by amending the former, so as to conform to the latter.

*Seemle*, the Judge to whom application is made for an order to arrest, has only to be satisfied of the existence of a cause of action, &c., and an intention on the part of defendant to abscond with intent, &c.

The order itself can be rescinded only by the Court, but after arrest defendant may apply for his discharge on the ground of non-existence of the debt, or otherwise upon the merits, to any Judge in Chambers, or to the County Court Judge who granted the order. Such an application is not an appeal from the order to arrest, and new facts must be shewn to warrant the discharge of the prisoner, unless it be granted on account of manifest and vital defects in the original material.

Either of these orders may be discharged or varied by the Court, which possesses over the original order to hold to bail,

(1) A general appellate jurisdic-

tion on the identical material which was before the Judge,

(2) An express statutory jurisdiction to rescind the order, upon a motion to discharge the prisoner.

In addition to this, the Court has also a co-ordinate jurisdiction with a Judge in Chambers, or the County Court Judge who granted the first order, to discharge the prisoner upon merits appearing in the affidavits of both parties.—*Damer et al. v. Busby*, 356.

3. *Affidavit—Entitling.*—An affidavit to hold to bail is not irregular, though not entitled in a Court.—*Molloy v. Shaw*, 250—*Damer et al. v. Busby*, 356.

4. The affidavit to hold to bail may be entitled in a Court or cause, or one of them, or it may be altogether without title; and it is sufficient to say that a deponent “is informed and believes,” if the source of his information be given.—*Damer et al v. Busby*, 356.

## ASSESSMENT.

*Appeal—Statute labour—Jurisdiction of County Judge.*—An island forming part of a municipality, but situated in no road division, and deriving no benefit from the roads of the municipality, having been assessed for statute labour, the owners appealed to the County Judge, on the grounds of over assessment, and that the property was not liable to statute labour. On an application to stay proceedings before the Judge :

*Held*, that though a County Judge has authority to increase or reduce an assessment, or to rectify errors in or omissions from the roll, the question of liability for statute labour is beyond his jurisdiction. A

writ of prohibition was accordingly granted.—*The Township of Walsingham v. The Long Point Company*, 279.

### ASSIGNMENT OF DEBT.

See ATTACHMENT OF DEBTS, 2.

### ATTACHMENT.

*Writ of—From what office to issue—Sufficiency of material for—Entitling affidavits.*]—A writ of attachment was issued by the Clerk of the Process at Toronto, upon a Judge's order, which was granted upon affidavits, entitled "In the Court of Common Pleas," and in the cause. The affidavits of the plaintiffs stated that the defendant was indebted to plaintiffs in the amount of certain promissory notes, which were described, shewing them to be overdue, and held by the plaintiffs, and that defendant had departed, &c., with intent to defraud the plaintiffs. The affidavits of two witnesses stated that the defendant had carried on business in Toronto, and that they believed he had departed, &c., with intent to defraud the plaintiffs.

*Held*, that the writ was properly issued by the Clerk of the Process, who should issue all original writs from the principal office, Toronto.

It is not necessary that the plaintiff should swear that the debtor was residing within Upper Canada, if that fact is sworn to by other persons.

It is sufficient to shew that the debtor intends to defraud the plaintiffs, without shewing an intention to defraud creditors generally.

The affidavits are not vitiated by being entitled before the issue of the writ.

If a defendant be held to bail for too large a sum, this can be amended.

The promissory notes, or the cause of action, being set out fully, the indebtedness of the defendant is alleged with sufficient certainty.—*Wakefield et al. v. Bruce*, 77.

### ATTACHMENT OF DEBTS.

1. *Affidavit for—Verdict—Equitable interest.*]—An order to attach a debt should not be made without an affidavit either of the plaintiff or of his attorney, stating the indebtedness of the garnishee.

A verdict against an insurance company for unliquidated damages, even although not moved against, and which the company had promised to pay without entry of judgment, cannot be attached until it becomes a debt by judgment.

A debt due by the garnishee to a person who is a trustee of it for the judgment debtor cannot be attached to satisfy the judgment debt: there must be a legal debt due by a legal debtor to a legal creditor.—*Boyd et al. v. Haynes—British America Assurance Company, Garnishees*. 15.

2. *Assignment—Notice.*]—The judgment debtor, through his sub-contractors, delivered to the garnishees certain railway ties, and gave the sub-contractors an order on the garnishees for all the money coming to him therefor. Subsequently to this, but before the garnishees had any notice of the above order, they were served with the attaching order in this case.

*Held*, that the order in favor of the sub-contractors operated as an assignment of the fund to them, although there was no notice of it to



the garnishees, they not having been led by the want of notice to alter their position so as to make it inequitable as against them to enforce the assignment.—*Brown v. McGuffin*.—*Great Western Railway Co., Garnishees*, 231.

3. *Gift*.]—A sum of money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons to pay over. The order was issued on the 17th of August, thirteen days before the bank agency, where the debtor resided, was advised of the deposit.

*Held*, that the amount could not be attached.

*Semble*, that the father might revoke the gift, and therefore it could not be looked upon as a debt.—*Caisse v. Tharp*.—*Bank of Montreal, Garnishees*, 265.

See DIVISION COURTS, 2.

## ATTORNEY.

1. *Lien for costs—Settlement between parties*.]—Where a suit is commenced and carried on under instructions from a person who gave the attorney to understand that he was acting as agent for the plaintiff, but the attorney took no trouble to ascertain the truth of this, and proceeded without any communication with the plaintiff, the attorney will not be protected as to his costs where a settlement is made between the parties which has the effect of depriving him of his lien, but will be left to establish his cause of action against the plaintiff by suit.—*Smith v. Thompson*, 166.

2. *Town agent—Demand of costs*.]—*Thompson v. Billing*, 11 M. & W. 361, remarked upon; the practice therein allowed as to proceeding on a demand of money from the town agent for a country attorney without giving time for correspondence between them, thought to be unreasonable.—*In re Robertson et al.* 132.

3. *Vexatious conduct*.]—Remarks upon the vexatious and oppressive conduct of an attorney in enforcing a levy for costs without any necessity, after an offer of payment in a reasonable time and manner, and upon the introduction of irrelevant and improper matter into an affidavit.]—*Davidson et al. v. Grange*, 258.

*Ordered to pay costs*.]—See INFANT, 5—COSTS, 6,

## ATTORNEY GENERAL.

*Fiat of, for sci. fa.*]—See PATENT, 2.

## AWARD.

See ARBITRATION AND AWARD.

## BAIL.

*Power of Judge in Chambers to rescind order for—New sureties*.]—Where a prisoner charged with felony had been admitted to bail upon an order of a Judge in Chambers, and an application was subsequently made to rescind such order, and to re-commit the prisoner to gaol, on the ground that he had not been committed for trial at the time such order was granted, and also upon the ground that the bail put in was fictitious:

*Held*, that a Judge in Chambers

has power to make the order asked for : but the order in this case was conditional upon the failure of the prisoner to find new sureties within a specified time.—*The Queen v. Mason*, 125.

### BANK DEPOSIT.

See ATTACHMENT OF DEBTS, 3.

### BASTARD.

*Right of mother to custody of illegitimate child.*—See INFANT, 4 a.

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Lost note—Indemnity.*—A person suing on a lost note should, before he commences his action, tender an indemnity to the maker. If he neglect this it will be at the risk of costs to defendant.—*La Banque Jacques Cartier v. Strachan*, 159.

*Note made in U. S. payable in Canadian currency.*—See COUNTY COURT, 1.

### CAPIAS.

See ARREST, 1, 2.

### CERTIFICATE FOR COSTS.

See COSTS, 1, 2.

### CERTIORARI.

1. *To remove a cause from a Division Court.*—The mere fact that a Judge of a Division Court has expressed an erroneous opinion in a case before him, is no ground for its removal by *certiorari*.

Where a defendant knows all the facts of a case before the day of

trial, but, nevertheless, argues the case and obtains an opinion from the Judge, the case should not be removed, and the fact that the Judge is desirous that the case should be disposed of in the Superior Court, can make no difference.—*Holmes v. Reeve*, 58.

2. *To return evidence—Amendment.*—*Held*, that where a *certiorari* simply requires a return of the evidence, the magistrate need not return the conviction or a copy of it.

*Semble*, that if material evidence be given before a magistrate, but unintentionally omitted from such a return, an amendment may be allowed to supply it, but only with the concurrence of the parties, and of the witness by whom the deposition was signed, in the correctness of the additions, but it cannot be supplied by affidavit.—*Regina v. McNaney*, 438.

3. *Conviction—Sale of liquor contrary to by-law—Appeal.*—The above persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors and the issue of licenses were prohibited under the Temperance Act of 1864, 27 & 28 Vic. cap. 18, and a memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the Justices to the accused.

An application for writs of *certiorari* to remove the convictions for the purpose of quashing them was refused ; for even if the conviction should have been under the Temperance Act of 1864, and not under 32 Vic. cap. 32 (Ont.), it was amendable.

*Quære*, whether the conviction could not be supported as it stood.

*Semble*, that although 27 & 28 Vic. cap. 18, sec. 36, takes away the right of *certiorari* and appeal, a *certiorari* may be had when there is an absence of jurisdiction in the convicting Justice, or a conviction on its face defective in substance, but not otherwise.—*In re Watts* and *in re Emery*, 267.

### CHAMBERS.

*See* JUDGE IN CHAMBERS.

### CHANGE OF VENUE.

*See* VENUE, 2.

### CIVIL REMEDY.

*During prosecution for felony.*—*See* EXTENT.

### CLERK OF QUEEN'S BENCH.

*Jurisdiction of, in Chambers.*—*See* JUSTICE OF THE PEACE.

### COMMISSION TO EXAMINE WITNESSES.

*See* EVIDENCE, 1.

### COMMITTAL.

*Order for, under Insolvent Act.*—*See* INSOLVENCY, 2.

### COMPANY.

*See* EXECUTION.

### CONTRACT.

*Execution of.*—*See* APPRENTICE.

*With corporation.*—*See* MUNICIPAL ELECTIONS 1, 2, 3.

*With Indian.*—*See* INDIAN.

## CONTROVERED ELECTIONS.

*See* PARLIAMENTARY ELECTIONS.

### CONVICTION.

*See* CERTIORARI, 3.

### CORONER.

*Inquest.*—A coroner's inquest held on Sunday is invalid.—*In re Cooper*, 256.

### COSTS.

1. *Certificate for—Set-off—31 Vic. ch. 24, secs. 1-2. Ont.*—A certificate under the above Act was granted, after a verdict for \$118, "to entitle the plaintiff to County Court costs :"

*Held*, that there could not be a set-off of costs on such certificate.]—*Moore v. Price et al.* 9.

2. *Certificate for full costs—Overflowing land—1s. damages.*—Under the Statute of Ontario, 31 Vic. ch. 24, sec. 1, a Judge should certify for costs where he would have done so under the repealed section of the C. L. P. Act.

In an action for overflowing plaintiff's land, the defendant pleaded not guilty, and the jury found for plaintiff with one shilling damages.

*Held*, that under the circumstances of the case (there being important rights at stake, and it being such a case as would properly be removable from an inferior Court by *certiorari*), the plaintiff was entitled to a certificate for full costs under 31 Vic. ch. 24, sec. 1, Ont.]—*Orok v. Garvin*, 169.

3. *Consent to verdict—Rule silent as to costs.*—Verdict for defendant,

Rule for new trial unless defendant should consent to verdict for plaintiff for nominal damages, no reference being made as to costs. The defendant consented, and plaintiff asked for costs of the rule:

*Held*, that the plaintiff was entitled to the costs of the application for new trial and the rule granted thereon.—*Lowe v. Morrice*, 36.

4. *Election by plaintiff to reduce verdict.*—When a plaintiff, after argument of a rule *nisi* to enter a nonsuit, or for a new trial, on the ground of excessive damages, elects to reduce his verdict instead of submitting to a new trial, with costs to abide the event, he is not entitled to the costs of opposing the rule *nisi*.—*Florey v. Royal Canadian Bank*, 257.

5. *Ejectment — Purchaser after action brought.*—In an action of ejectment, the defendant appeared and claimed title as tenant of one R. Two days before appearance, R. had disposed of his interest in the lands to S., who, after notice of trial, applied on affidavits setting out the conveyance and the subsequent attornment to him of defendant (now his lessee) to be admitted as landlord to defend the action; but the application, being opposed by the plaintiff, was refused.

Plaintiff having succeeded, applied for a rule ordering S. to pay the costs of the action, on the ground that the defendant was insolvent, and the conduct of S., both in making the above application and at the trial and subsequently thereto, proved him to be the real defendant.

*Held*, that plaintiff was not estopped from making such an application by having opposed the prior application of S., and the rule was

made absolute.—*Lutz v. Beadle*, 418.

6. *Taxation—One-sixth struck off.*—Where one item had been abandoned by an attorney after a summons taken out for the taxation for his bill, but before actual taxation, and one-sixth was afterwards struck off the whole bill, including such item:

*Held*, that the attorney was properly ordered to pay the costs of taxation.—*In re Davy*, 55.

*Attorney ordered to pay.*—See last case.—INFANT, 5.

*New trial on payment of.*—See NEW TRIAL.

*Security for.*—See SECURITY FOR COSTS.

*Taxation of Costs on award by deputy clerk of Crown.*—See ARBITRATION AND AWARD, 5.—ATTORNEY.—DOWER.

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## COUNTY COURT.

1. *Law Reform Act, 1868—Order to try in—Ascertained amount.*—An action on a promissory note made in United States, sued on as if made in this Province, and payable in Canadian currency, was brought down for trial from a Superior Court to a County Court, without a Judge's order:

*Held*, that such case was improperly brought down and that it was one in which an order was necessary.—*Cushman et al v. Reid*, 121.

2. *Law Reform Act, 1868, sec. 17.*—Under the above section no case can be taken down to a County Court for trial unless the amount is ascertained by the signature of defendant, or "liquidated" in the same way.—*McPherson et al v. McPherson*, 240.



3. *Jury in cases from Superior Courts.*—Under section 18 of the Law Reform Act Judges of County Courts can try cases brought down from Superior Courts without the intervention of a jury.—*Cushman et al. v. Reid*, 121.

## COUNTY COURT JUDGE.

*Power under Assessment Act.*—See ASSESSMENT.

See ARREST—COUNTY COURT.

## CRIMINAL LAW.

See ADMIRALTY—EXTENT—EX-TRADITION—VENUE.

## CROSS-EXAMINATION.

See EVIDENCE, 4.

## CROWN PRACTICE.

See EXTENT—INFORMATION OF IN-TRUSION.

## CUSTODY OF INFANTS.

See INFANT, 1, 2, 3, 4, 4 a.

## DECLARATION.

*Demand of dower in.*—See DOW-er, 2.

*Before appearance.*—See IRREG-ULARITY 2.

*Not founded on summons.*—See IRREGULARITY 4.

*Omission of plaintiff's name in.*—See IRREGULARITY 1.

*Separating cause of action.*—See PLEADING, 12.

## DEMAND.

*Of costs.*—See ATTORNEY 2.

*Averment of, in Dower.*—See DOWER, 2.

*Under Fence Viewers' Act, C. S. U. C. cap. 7, sec. 15.*—See FENCE VIEWERS.

## DIVISION COURT.

1. *Jurisdiction—Contract or tort.*—A plaint in a Division Court charging that defendant hired of plaintiff a horse, &c., to go from A. to B. and back, and agreed to take good care of same as a bailee, with an averment that the defendant so carelessly, &c., drove said horse, &c., that horse was killed, &c., is a plaint in contract and not in tort.—*In re Rumble v. Wilson*, 38.

2. *Garnishment proceedings—New trial.*—Held, that under 32 Vic. cap. 23, O., a Judge of a Division Court has power in garnishment proceedings, when the justice of the case requires it, to grant a new trial after a lapse of fourteen days, notwithstanding Con. Stat. U, C. cap. 19, sec. 107.—*In re McLean and McLeod*, 467.

See CERTIORARI.

## DOMINUS LITIS.

See ARBITRATION AND AWARD 2.

## DOWER.

1. *Demand—Costs.*—Judgment was signed in dower on default of plea to a declaration which averred demand of dower one month before action, and that the action was brought in less than one year from such demand; but no affidavit of service of the demand was produced to the master on taxation.

An offer to assign dower was made before action brought. The master having taxed to the demandant the costs of suit, an application was made to set aside so much of this judgment as related to costs, but

*Held*, that the demandant was entitled to costs, and that the judgment was regular.

2. *Averment of demand.*]—*Semble*, the declaration is a proper place, though perhaps not the necessary place, for averring the necessary demand for dower, and where it does contain it, the averment is admitted by a judgment by default.—*Gilleland v. Reid*, 96.

*Appearance for infant defendant in.*]—*See* INFANT, 5.

EJECTMENT, 3.

## EASTER MONDAY.

*See* PARLIAMENTARY ELECTIONS, 1.

## EFFETE ORDER.

*See* JUDGMENT DEBTOR, 1.

## EJECTMENT.

1. *Interrogatories.*]—The provisions of C. L. P. Act with reference to interrogatories are applicable to proceedings in ejectment.—*Weaver v. Burgess et al.* 345.

2. *Retaking possession.*]—Under the circumstances set out below a new writ of *hab. fac. pos.* the first having been executed and returned was refused.

No such relief will be given to a plaintiff when the parties against whom the application is made, do not assert title through the defendant, but in some other way, and

where no forcible taking possession or expulsion of the plaintiff, or interference with the plaintiff's officer in the execution of the writ, is shewn.—*Edwards et al. v. Bennett*, 161.

3. *Striking out defendant—Terms.*]—The name of a defendant, who disclaimed all interest in the land, except as dowress, struck out of the proceedings in ejectment.—*Weaver v. Burgess et al.* 307.

4. *Vacant possession—Setting aside writ.*]—A writ of ejectment was issued against the defendant, who (as was alleged by the plaintiff and not denied by the defendant) claimed to be owner of the land in question. The possession was vacant, and it was not shewn that the defendant was last in possession.

*Held*, that the defendant was entitled to have the writ set aside without disclaiming title.—*Wallace v. Acre*, 142.

5. *Substitution of landlord.*]—Where in ejectment a landlord is allowed to come in and defend, the order not saying whether it is instead of or in addition to the original defendant it is irregular to omit the name of the latter.]—*Yeoman v. Chesley B. Steiner*, 466.

*Second action between same parties for same land.*]—*See* SECURITY FOR COSTS, 1.

*Practice where plaintiff is an infant.*]—*See* INFANT, 6.

*Purchase after action—Order for costs.*]—*See* COSTS, 5.

## ELECTIONS.

*See* MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTION.

## ENTITLING.

See AFFIDAVITS.

## EQUITABLE INTEREST.

*Attachment of.*—See ATTACHMENT OF DEBTS, 1.

## EQUITABLE PLEA.

See PLEADING, 1, 4.

## EVIDENCE.

1. *Commission to examine witnesses.*—An order for the examination of witnesses out of the jurisdiction will not be made before issue joined, merely for the purpose of expediting proceedings.—*Allan v. Andrews*, 32.

2. *Extradition—Evidence of accomplices.*—Evidence of accomplices is sufficient in extradition cases.—*Re Caldwell*, 217.

3. *Extradition—Depositions*—31 *Vic. cap. 94*, 32–33 *Vic. 13.*—Under section 2 of the above Act, the depositions that may be received as evidence of the criminalty of the prisoner must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing it, and not depositions taken subsequently to the issue of the original warrant and without any apparent connection therewith.—*The Queen v. Robinson*, 189.

4. *C. L. P. Act. secs. 184, 188—Right to cross-examine.*—On an examination of a witness, under C. L. P. Act, secs. 184, 188, his evidence will not be read if the right of cross-examination has been denied.—*Colville v. Johnston*, 462.

*Reception of improper.*—See ARBITRATION AND AWARD, 4.

See AFFIDAVIT, 3—EXTRADITION.

## EXAMINATION.

*Of judgment debtor.*—See JUDGMENT DEBTOR.

## EXECUTION.

1. *Amending return to writ—Delay.*—*Held*, that the returns to writs of *fi. fa.* and *ven. ex.* lands could be amended so as to make them correspond with the facts (but upon terms), although a sale had been made under them, and after a lapse of over ten years.—*Scott v. School Trustees of section 1 in Burgess, and section 2 in Bathurst*, 228.

2. *Stock in incorporated company.*—*Held*, that stock in an incorporated company is only bound from the time when the notice of the writ is given to the company by the sheriff under Con. Stat. Can. cap. 70, secs. 3, 4, and not from the time of the delivery of the writ to the sheriff.—*Hatch v. Rowland*, 223.

*Irregularity in fi. fa.*—See IRREGULARITY, 3.

## EXTENT.

*Commission to find debt—Affidavit of danger—Felony and civil remedy.*—*Held*, 1. That a debt whereon to found a writ of extent may be found on inquisition without *viva voce* testimony.

2. That an affidavit of danger is sufficient, if it satisfy the Judge to whom the application for a fiat for a writ of extent is made, that there is danger that the debt will be lost if immediate remedy is not granted.

3. That it is not an irregularity, that an inquisition finds that the defendant was a debtor to the Crown on the 20th July, the inquisition being filed and a writ of extent issuing on the 21st July.

4. That the rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded, does not apply where the Crown, and not a private person, is the plaintiff.]—*Regina v. Reiffenstein*, 175.

### EXTRADITION.

*Habeas Corpus—Forgery—Warrant—Evidence of accomplice.*]—*Held*: 1. It is not necessary under the Extradition Treaty and Act, that an original warrant should have been granted in the United States for the apprehension in this country of the person accused, to enable proceedings to be effectually taken against him in this Province for an offence within the treaty.

2. The evidence of accomplices is sufficient to establish a charge for the purposes of extradition.

3. Where the crime comes within the treaty, it is immaterial whether it is according to the laws of the United States only a misdemeanor and not a felony.

4. A magistrate here holding an investigation for the purpose of extradition should not go beyond a bare inquiry into the matters of defence which do not affect such criminality. — *In re Richard B. Caldwell*, 217.

*When depositions can be used as evidence.*]—See EVIDENCE, 3.

### FENCE VIEWERS.

1. Award—*Right of appeal*—C.

*S. U. C. ch. 57, 32 Vic. ch. 46. O.*]—The right of appeal to a County Court Judge against an award of fence viewers, under 32 Vic. ch. 46, sec. 8, is not restricted to an award made under sec. 6, sub-sec. 2 of the Act, when the land benefited is in two municipalities, but extends to an award made by three fence viewers under C. S. U. C. ch. 57, which the later Act amends and is made part of.—*In re McDonald et al. and Cattunach et al.* 288.

2. *Watercourses—Contiguous lots.*]—To constitute a “joint interest,” within the meaning of sec. 7, C. S. U. C. ch. 57, it is not necessary that the lands occupied should be contiguous lots.

The question whether such interest exists is to be determined entirely by the fence viewers, and their discretion cannot be reviewed if fairly and reasonably exercised.

*Semble*, the absence of a demand under section 15, may be waived by the subsequent conduct of the parties. — *In re Roberts and Holland*, 346.

### FAIR TRIAL.

See VENUE, CHANGE OF, 2, 4.

### FELONY.

*Civil remedy, pending prosecution for a.*]—See EXTENT.

### FI. FA.

See EXECUTION.

### FORMER ACTION.

See STAYING PROCEEDINGS.



## FORFEITURE OF SEAT.

See MUNICIPAL ELECTIONS 11.

## FRAUD.

See PARTICULARS.

## GARNISHEE.

See ATTACHMENT OF DEBTS.

## GFT.

See ATTACHMENT OF DEBTS, 3.

## GOOD FRIDAY.

See PARLIAMENTARY ELECTIONS, 1.

## HABEAS CORPUS.

See ARBITRATION.

## HOLIDAYS.

See PARLIAMENTARY ELECTIONS, 1.

## ILLEGITIMATE CHILD.

See INFANT, 4 a.

## INCORPORATED COMPANY.

*Stock of, when bound by execution.*—See EXECUTION 2.

## INCUMBRANCES.

*Effect of, on qualification of municipal councillors.*—See MUNICIPAL ELECTIONS, 4, 5.

## INDEMNITY.

See BILLS OF EXCHANGE, &c.

## INDIAN.

*Contract with—Interpretation of statute—Repealing Acts.*—A debt contracted by an Indian while Con. Stat. Can. cap. 9 was in force, cannot now be sued for under 32-33 Vic. cap. 6.

*Quære*, whether a judgment can be obtained against an Indian even under the latter Act.]—*McKinnon v. Van Every*, 284.

*Eligible as a municipal councillor.*—See MUNICIPAL ELECTIONS, 6.

## INFANT.

1. *Custody of—Right of father*—29-30 Vic. cap. 45.]—A girl aged thirteen years and ten months, who had lived with her aunt from infancy, was allowed, on an application by her father for her custody, on allegations that she was illtreated by her aunt, to elect whether she would remain with her aunt, or to go to her father.

*Semble*, that if the child had recently left or been taken away from her father she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen.—*In the matter of Mary Therese Kinne*, 184.

2. *Custody of—Con. Stat. U. C. cap. 74, sec. 8.*—Upon an application by the mother, under Con. Stat. U. C. cap. 74, sec. 8. for the custody of her infant daughter, four years of age, the husband and wife having separated:

*Held*, after reviewing the case decided under the corresponding English Act, that the statute in question does not take away the common law right of a father to the custody of his child, but only makes

the recognition of this paternal right conditional upon the performance of the marital duty, and subjects it, in some degree, also to the interest of the child.

If, therefore, upon an application of this kind, it appears that the husband and wife are living apart, the Court will inquire into the cause of their separation, in order to ascertain, (1) whether the husband has forfeited, by breach of his marital duties, this *prima facie* right to the possession of his child. (2) And whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit and protection of the statute, which was intended "to protect wives from the tyranny of their husbands, who ill-use them."—*In the matter of Sophia Louisa Leigh*, 402.

3. *Held*, on application to rescind an *ex parte* order which gave to the mother, and took from the father the custody of their children under the age of twelve years, under Con. Stat. U. C. cap. 74, that the facts and circumstances set out in the report shewed it to be for the general benefit and interest of the children that they should be withdrawn from the custody of the father and placed under that of the mother; the statute being unrestricted in its operation in all cases within its provisions, leaving the decision of each particular application in the discretion of the Court or a Judge, irrespective of the common law rights of the father. The learned Judge therefore declined to rescind the order made in favor of the mother.—*In re Allen*, 443.

4. *Custody of children—Disobedience of order—Contempt.*—An

order was made for the delivery of infant children by the father to the mother. On an application to commit the father for contempt in not obeying this order it appeared that in his absence from home the children had been removed from his house, and taken to the United States by his son, aged fifteen. They denied collusion, the son saying that he acted without his father's knowledge or consent; but the father took no steps to bring the children back, and did not offer to do so, if time were given him. To the demand made for the children, the father replied that they were not in his custody:

*Held*, that he was not excused from obeying the order, and was in contempt.—*Regina v. Allen*, 453.

4a. *Right of custody of illegitimate child.*—*Held*, that the mother of an illegitimate child is not entitled to all the rights of guardian for nurture.

That the mother differs only from a stranger in this, that during the period of nurture (under seven) the child may not be separated from the mother by force or fraud.

But when she has abandoned the child, and others have adopted it, or if she has placed it under the protection of others, and afterwards claims it as its mother or guardian for nurture, the Court will not recognize such claim as a legal right, but will refuse to interfere, if the interests of the infant will thereby be best protected.—*In re Edney Jane Holeshed*, 251.

5. *Must appear by guardian—Costs.*—An infant cannot appear by attorney, but by guardian. If the appearance is by attorney, all subsequent proceedings are irregular.

And an attorney who appears for an infant, knowing of his infancy, will be ordered to pay the costs of all subsequent proceedings. and of the application to set the same aside.—*Macaulay v. Neville and Macaulay*, 235.

6. *Ejectment by — Procedure.*] An infant plaintiff can sue out a writ of ejectment in his own name; but after appearance entered, he cannot take any further step, such as giving notice of trial, without having a next friend appointed; and any such further proceedings in the infant's own name will be set aside.—*Campbell v. Mathewson*, 91.

7. *Prochein amy — Security for costs.*]—An application to remove the next friend of an infant plaintiff on the ground of insolvency, or to stay proceedings till security for costs is given, must be made promptly after declaration served, according to the rule in ordinary cases when security for costs is applied for.

When the Court has appointed the natural guardian of an infant as next friend, and it appears probable that no one else can be found to act in time for the assizes, and no imposition has been practised upon the Court in making such appointment, such next friend will not be removed nor will he be ordered to give security for costs, although in destitute circumstances.—*Morris v. Leslie*, 141.

[See SECURITY FOR COSTS, 3.]

## INFORMATION OF INTRUSION.

*Information of intrusion*—*Subpœna ad res.*—*Setting aside proceed-*

*ings.*]—1. In an information of intrusion the proper process to bring the defendant into Court is a writ of subpœna *ad respondendum* directed to the defendant.

2. This writ can be issued after the information is filed, and, in this country, without the information being entered; and a specific prayer for such process is not necessary.

3. Such writ may be tested as of term, though sued out in vacation; and need not be served fifteen days before the return.

4. The affidavit of service of the subpœna is properly entitled in styling the Attorney General, "Informant."

5. If the subpœna is not obeyed a writ of attachment may be obtained *ex parte* against the body of the defendant, but, *semble*, the better practice is not to grant such a writ against the person unless a special affidavit be filed shewing a necessity therefor.

6. *Quere*, as to the right of a defendant in contempt for non-appearance, but not actually arrested, to move *quia timet* to set aside the process issued against him.

7. When an application is made to set aside or amend a writ or other proceeding, by reason of anything contained therein or omitted therefrom, such writ or other proceeding (or a copy of it), must be brought before the Court; but if the application be to set it aside because obtained irregularly, then it is sufficient to shew the facts upon affidavit.—*Attorney-General v. McLachlin*, 63.

## INJUNCTION.

See INFANT, 1.

## INQUEST.

*On Sunday is invalid.] — See CORONER.*

## INSOLVENCY.

1. *Act of 1864, sec. 3, cl. c. and sub-sec. 7 — Attachment — Grounds for—Affidavit—Form of, and who can make.]—*The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor his debt, does not bring the debtor within sec. 3, clause c., of the Insolvent Act, 1864.

Intitling affidavits for an attachment under the Insolvent Act, 1864, form F. should be followed.

Sec. 3, sub-sec. 7, is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts and circumstances relied on as constituting insolvency.—*Sharpe and Secord v. Matthews*, 10.

2. *Act of 1865, sec. 29—Order for committal without summons to shew cause.]—*An insolvent cannot legally be committed under sec. 29 of 29 Vic. cap. 18, without an opportunity of shewing cause, and it should appear in the order of committal that he has had notice of the order for delivery, &c., for non-compliance of which an order of committal is asked.—*In re Hicks, an insolvent*, 88.

## INSOLVENT DEBTOR.

See JUDGMENT DEBTOR.

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## INSURANCE.

*Reference to arbitration in action on policy.]—See ARBITRATION AND AWARD, 6.*

*Mortgage of interest—Pleading several matters.]—See PLEADING, 4.*

## INTERLINEATION.

See AFFIDAVIT, 2.

## INTERROGATORIES.

See EJECTMENT, 1.

## INTRUSION.

See INFORMATION OF INTRUSION.

## IRREGULARITY.

1. *Omission of plaintiff's name in declaration.]—*A declaration which omits the name of the plaintiff in its commencement is irregular.—*Hartleb v. Phelan*, 264.

2. *Declaration before appearance.]—*An attorney who should have entered an appearance for defendants on the 22nd did not do so until the 25th. The defendants, by the same attorney, then applied to set aside the copy and service of declaration, on the ground that at the time of declaring no appearance had been entered, but

*Held*, that, as the attorney had authority to act as such, the service could not be set aside.—*Cockburn v. Rathbun et al.* 276.

3. *Transposing names—*In a writ of *fi. fa.* and the endorsements thereon the plaintiffs were styled defendants, and *vice versa*, the words being transposed throughout, and the Christian names of the defendant were also transposed :



*Held*, that the writ and endorsements were clearly irregular.—*Davidson et al. v. Grange*, 258.

4. *Declaration not founded on writ.*]—A declaration without a writ of summons to ground it is only an irregularity which may be waived.

An affidavit to support an application to set aside such a declaration must shew that the writ of summons has not come to the defendant's knowledge.—*Cooper v. Watson*, 30.

See NOTICE OF TRIAL, 1—PROHIBITION, 1.

## ISSUE.

*Entry on, under Law Reform Act.*]—The entry required by sec. 17 and schedule A of the Law Reform Act, 1869, to "be made in the issue and subsequent proceedings" when it is desired to take a Superior Court case down for trial to a County Court, is sufficient if made on the issue book in place of the *venire facias*.—*Walkem v. Donovan*, 118.

See ISSUE BOOK—RECORD—JUDGMENT ROLL.

## ISSUE BOOK.

*Alteration of pleadings.*]—Where pleadings are altered in a material point, it is necessary to serve a new or amended issue book.—*Commercial Bank v. Harris*, 214.

## JUDGE IN CHAMBERS.

*Powers of, as to arrest.*]—See ARREST, 1, 2.

*Power of, to rescind order for bail.*]—See BAIL.

*Power of Clerk of Q. B. as.*]—See JUSTICE OF THE PEACE.

## JUDGMENT DEBTOR.

1. *Examination—Effete order.*]—An execution creditor cannot examine a judgment debtor on a stale order which has been partially acted upon.—*McGregor v. Small*, 56.

2. *Examination—Residence—Member of Parliament.*]—An order will not be made for the examination of a judgment debtor whose home is in the province of Quebec, though temporarily residing in Ontario attending to his duties as a member of Parliament.—*Regan v. McGreevy*, 94.

## JUDGMENT ROLL.

*Form of—Where issues of law and fact, and declaration held bad.*]—Where defendant obtains judgment in demurrer because of the insufficiency of plaintiff's declaration, although there are also issues in fact and demurrers to pleas, the judgment roll should contain only the declaration, demurrer, and judgment, omitting all intermediate proceedings.—*County of Frontenac v. City of Kingston*, 298.

## JURAT.

See AFFIDAVIT, 1, 4.

## JURY.

See COUNTY COURT, 3.

## JUSTICE OF THE PEACE.

*Con. Stat. U. C., cap. 126, secs. 3, 8—Setting aside proceedings*]—Where, in an application to set aside proceedings (as in the case of an action against a J. P. for acts done under a conviction which has not been quashed), the facts relied upon would be a pleadable bar to the action, laches will not be imputed to the defendant because he does not apply before entering an appearance, though it might if he waited until after the expiration of the time for pleading had expired.

The Clerk of the Queen's Bench sitting in Chambers has clearly jurisdiction to entertain such an application. — *Donelly v. Tegart*, 225.

*Jurisdiction on great lakes of Canada.*]—See ADMIRALTY.

## JUSTIFICATION.

*Pleaded with "not guilty."*]—See PLEADING, 5.

## LAKES.

See ADMIRALTY.

## LANDLORD.

*Substitution of, in ejectment.*]—See EJECTMENT, 5.

## LIEN FOR COSTS.

See ATTORNEY, 1.

## LIQUIDATED AMOUNT.

See COUNTY COURTS, 1, 2.

## LIQUOR.

*Conviction for selling without license.*]—See CERTIORARI, 3.

## LOST NOTE.

See BILLS OF EXCHANGE, &c.

## MAGISTRATE.

See JUSTICE OF THE PEACE.

## MEMBER OF PARLIAMENT.

See JUDGMENT DEBTOR, 2.

## MISCONDUCT OF ARBITRATOR.

See ARBITRATION AND AWARD, 4.

## MISTAKE.

See ARBITRATION AND AWARD, 3.

## MUNICIPAL COUNCILLORS.

See MUNICIPAL ELECTIONS—SANDWICH.

## MUNICIPAL ELECTION.

1. *Disqualification—Contract with Corporation.*]—The treasurer of a township was appointed by annual by-laws, which were silent as to time, in 1859, 1860, and 1861. In 1861 the defendant became his surety by bond, which, however, did not state the duration of the liability. In 1863 the same treasurer was also appointed by a similar by-law. In 1864 the by-law

limited his liability to the year 1864. From thence to 1868 no time was specified, but his term was then limited to that year. In 1869 the treasurer's accounts were audited and found correct.

*Held*, that this bond was only a continuing security until the expiration of the treasurer's term of office, and that the liability ceased on his re-appointment in 1863, and that therefore the defendant had not a contract with the corporation so as to disqualify him as a councillor.—*Regina ex rel. Ford v. McRae*, 309.

2. The trustees of a common school in the town of Sandwich being about to erect a school house, the defendant Gauthier offered to supply a certain quantity of brick to them for that purpose. They told him that if the town council would agree to pay him for the bricks they would take them. He then said that he would take payment for them by letting the amount go against his taxes in each year, with interest at eight per cent. upon the whole amount unpaid. This proposition was made by defendant in person to the town council and was accepted by them. The defendant furnished the bricks. *Held*, that under these circumstances the defendant was disqualified from sitting as a councillor of the town.

The Statute disqualifying a contractor from sitting as a councillor of a municipality, does not require that the contract should be binding on the corporation.—*Regina ex rel. Fluet v. Gauthier*, 24.

3. A municipal corporation by by-law granted to defendant upon certain conditions a right to build a dam and bridge across a river, in

consideration of which he agreed to keep it in repair for forty years at his own expense, but if he should make default the privilege granted by the corporation was to cease. The dam and bridge were built and duly kept in repair by defendant:

*Held*, that the defendant was interested in a contract with the corporation; but that he was not disqualified as a municipal councillor, the contract amounting to a lease from the corporation of upwards of twenty-one years.—*Regina ex rel. Patterson v. Clarke*, 337.

4. *Qualification of candidate — Effect of incumbrances.*] — *Held*, that the fact of a property on which a candidate seeks to qualify being incumbered, cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification.—*Regina ex rel. Flater v. VanVelsor*, 319.

5 The amount of real property rated to a candidate on the assessment roll is so far conclusive as to his qualification that incumbrances cannot be taken into consideration to reduce it.

The distinction between real and personal property discussed.—*Regina ex rel. Philbrick v. Smart*, 323.

6. *Disqualification — Indians*] — An Indian, who is a British subject, and otherwise qualified (in this case by holding real estate in fee simple to a sufficient amount,) has an equal right with any other British subject to hold the position of reeve of a municipality, even though not enfranchised, and though receiving,

as an Indian, a portion of the annual payments from the common property of his tribe.—*Regina ex rel. Gibb v. White*, 315.

7. *Qualification for Councillor—Personal property—Roll.*]—*Held*, That a person cannot qualify as town councillor on personal property.

That when a candidate was assessed on the roll for real property to the amount of \$750 (\$50 less than the freehold qualification required), he could not supplement it by an addition of \$400 assessed to him on personal property.

The assessment roll is conclusive as to the rating of those mentioned in it.—*Regina ex rel. Fluett v. Semandie*, 19.

8. *Two relations—First collusive—Right of second relator to attack it.*]—A stranger to the proceedings in a *quo warranto* matter may, if otherwise qualified, attack them on the ground that they have been initiated in collusion with the defendant, but he cannot set up irregularities, as such, unless indeed the relator has committed them purposely, as for example to secure the failure of his own proceedings.—*Regina ex rel. Patterson v. Vance*, 334.

9. *Right of candidate to resign—New nomination.*]—A candidate for the office of reeve, who is proposed and seconded at the nomination meeting, may, with the consent of his proposer and seconder and of the electors present, withdraw from his candidature.

A voter, who nominated another for a municipal office, having at the meeting permitted his candidate to retire from the contest, without expressing at the time any objection

to his withdrawal, cannot afterward insist upon having the name of his nominee published in the list of candidates, or entered as such upon the poll book.—*Regina ex rel. Coyne v. Chisholm*, 329.

10. *Improper conduct of returning officer—Election by acclamation.*]—At a meeting called to receive nominations for municipal councillors, one party, as they alleged, made their nominations at 12 o'clock or a few moments after, in the presence of only two or three persons, and without any effort on the part of the returning officer to call in the people outside the place of meeting. The returning officer did not enter the names of the candidates in his book, and gave evasive answers to some of the other party who came in afterwards, as to whether any nominations had been made or not, and led some of the electors present to think that there was an hour or so to make nominations, when in fact there was less than half that time. At 1 o'clock the returning officer, without making any preliminary statement that certain persons had been nominated, and without asking whether there were any other candidates to be nominated, declared that the persons nominated at the opening of the meeting were duly elected by acclamation. The other side, who were waiting, as they alleged, to make their nominations after the other party, under the impression that no nominations had as yet been made, protested against this, and desired to nominate the opposition candidates, (of whom the relator was one,) which the returning officer, however, refused to receive as being too late:

*Held*, that the election must



be set aside, and a new election ordered.

That the relator was a candidate and voter within the meaning of sec. 103 of the Municipal Act, although he had not been nominated or voted for, for the returning officer could not by his illegal acts divest him of his rights in that respect.

That the names of the candidates should have been submitted to the meeting *seriatim*, after the hour had elapsed, and an opportunity given to the electors present to express their assent or dissent, without which there could not be said to have been an election by acclamation.

That the returning officer had acted improperly and contrary to the spirit of the law, and was therefore ordered to pay the costs.—*Reg. ex rel. Corbett v. Jull*, 41.

11. *Forfeiture of seat—Procedure*]—A summons in the nature of a *quo warranto*, under the Municipal Act, is not an appropriate proceeding to unseat a defendant who has forfeited his seat by an act subsequent to the election, the election having been legal.—*Reg. ex rel. McGouverin v. Lawlor*, 208.

12. *Declaration of qualification*.]—A defective declaration of qualification of a candidate at a municipal election is not a ground for unseating him by the summary process under the Municipal Act.—*Reg. ex rel. Halsted v. Ferris*, 241.

13. *Notice of disqualification*.]—To entitle a candidate to the seat claimed by him on the ground of his opponent's disqualification, it must be shewn that the disqualification was objected to at the *nominatio*n, so that the electors might

have an opportunity of nominating another candidate.—*Reg. ex rel. Ford v. McRae*, 309.

## NEW TRIAL.

*On payment of costs—When to be paid.*]—When a plaintiff obtains a new trial on payment of costs, he is not bound to pay them before the next assizes, because, even had the costs been paid, the plaintiff could not be compelled to go to trial at such assizes; but he must be *tout temps prist* to pay the costs taxed to defendant.

On 19th June, the judgment for new trial was given, and on 19th August the rule was served, and on the 30th September, the costs were tendered.

*Held*, that the tender was made within a reasonable time.

A rule to rescind a rule for a new trial was therefore discharged, but, as the costs taxed were not paid into Court when this rule *nisi* was served, without costs.—*Stacey v. McIntyre*, 205.

*In Division Court.*]—*See* DIVISION COURT, 2.

## NEXT FRIEND.

*See* PROCHEIN AMY.

## NOTICE FOR A JURY.

1. A defendant can, under the Law Reform Act, sec. 18, give a notice for a jury with a pleading which joins issue on a replication taking issue on the defendant's plea.—*Quebec Bank v. Gray*, 3.

2. Plaintiff allowed to withdraw his issue, and file and serve another with a notice of jury.—*Synge v. Aldwell*, 94.

## NOT GUILTY.

See PLEADING, 5.

## NOTICE OF TRIAL.

1. *By proviso — Irregularity or nullity.*]—The defendant having given notice of trial by proviso, claiming that the plaintiff had made default in not proceeding to trial within due time after a new trial had been ordered—the question whether there had been, under the circumstances, a default, such as to enable the defendants to give this notice, considered, but not decided.

*Quære:* whether notice of trial by proviso has been abolished in this country.—*Summerville v. Joy et al*, 144.

2. *Short notice.*]—The words, “short notice of trial, if necessary,” have reference to the state of the cause, and not to the convenience of the parties.—*McMurray v. Grand Trunk R. W. Co.*, 272.

## OVERFLOWING LAND.

See COSTS, 2.

## PARLIAMENTARY ELECTIONS.

1. *Controverted Elections Act 1870—Return to writ—Time for filing petition—Holidays—Treating.*]—The twenty-one days limited for filing an election petition after the return of the writ, are to be reckoned

from the time of the receipt of the return by the Clerk of the Crown in Chancery, and not from the time of mailing by the Returning Officer.

Good Friday and Easter Monday are holidays within the meaning of the Act, and they are not to be reckoned in computing the twenty-one days.

The joint effect of Ont. Stat. 32 Vic. cap. 21, and the Ontario Interpretation Act, 31 Vic. cap. 1, sec. 7, sub-sec. 13 is, that when the word “holiday” is used, it includes the above days as “set apart by Act of the Legislature.”

The word “treating” refused to be struck out of the petition though not specifically prohibited by the Act.—*West Toronto Election Petition*, 394.

2. *Controverted Elections Act, 1870 Particulars.*]—Where particulars of alleged corrupt practices, &c., have been delivered under an order for that purpose, better particulars will not be ordered if those delivered substantially comply with the spirit of the order by giving all reasonable information.

Nor will better particulars be ordered even when the order is not complied with in furnishing certain details, provided the Judge to whom the application is made thinks these details unnecessary or unreasonable, nor unless the respondent can shew on affidavit that the want of such information will prejudice him in his defence.

*Semble*, that the powers of the Judge at the trial as to the amendment of the petition and particulars, and postponement of the trial, should be liberally exercised, so as to prevent a failure of justice to either party.—*West Toronto Election Petition*, 436.

## PARTICULARS.

*Fraud.*]—Particulars will be ordered of the fraud charged in a plea to a declaration alleging the breach of an agreement. It is sufficient if the affidavit on which the application is founded is made by the attorney on record.—*Bain v. McKay*, 465.

*Of charges in election petition.*]—See PARLIAMENTARY ELECTIONS 2.

## PATENT.

1. *Infringement—Injunction.*]—In an action for an infringement of a patent, an application under Con. Stat. U. C. cap. 23, sec. 9, for an injunction to restrain the defendant was refused, the patent having been very recently granted, and there being conflicting affidavits as to the rights of the plaintiff to it; and *held* that the plaintiff must establish his title at law before he would be entitled to an injunction.

*Seemle*, that the application would also have been refused under the Patent Act of 1869, sec. 24.

And that, to entitle a plaintiff to an interim injunction or account, he must waive all claim to more than nominal damages at the trial.—*Bonathon v. Bowmanville Furniture Manufacturing Co.* 195.

2. *Sci. fa. to repeal a patent—Fiat of Attorney General—Who to grant.*]—A *sci. fa.* to set aside a patent, was issued at the instance of a private relator without the fiat of either the Attorney General of the Dominion or of Ontario having been first obtained:

*Held*, that a fiat was necessary, and that the Attorney General of Ontario was the proper authority

to grant the fiat in such a case.—*The Queen v. Pattee*, 292.

## PLEADING.

1. *Equitable plea.*]—Part of the land included in a conveyance was inserted by mistake, the vendor not being, and not pretending to be, the owner of it. To an action on the covenants for title in the deed, the defendant pleaded these facts as an equitable defence: *Held*, that the plea was good as pleaded.

*Seemle*, Where a Court of Equity would give unconditional relief, although the procedure necessary to obtain it is unknown to Courts of Law, the matter of defence can be well pleaded as an equitable plea at law. When a contract has been executed, and nothing remains but the relief to be granted against the existing wrong, a Court of Law can grant it.—*Belyea and Wife v. Muir et al.* 273.

2. *Abatement—Prior action—Affidavit.*]—*Quære*, whether the pendency of a prior action in a County Court can be pleaded in abatement to an action in a Superior Court; but the question was left to be decided on demurrer.

Where the only affidavit of verification of a plea in abatement was made by the attorney for the defendant (in both actions), an application to set aside the plea was refused.—*Donnelly v. Reid*, 51.

3. *Abatement—Replying and demurring to.*]—Application for leave to reply and demur to a plea in abatement refused.—*Donnelly v. Reid*, 51.

4. *Several pleas—Insurance—Mortgage of interest.*]—In an action

on an insurance policy, the defendant will not be allowed to plead together an equitable plea that the policy had been assigned by the plaintiff to secure a mortgage debt, and that the amount of it had been paid to the mortgagee, and a legal plea that the plaintiff had effected a subsequent insurance without notice, contrary to a condition of the policy.—*Ott v. Liverpool, London, and Globe Insurance Company*, 156.

5. *Several pleas—Assault.*—In actions for assault the defendant will be allowed to plead not guilty and justification together.—*Purcell v. Welsh*, 29.

6. *Striking out issues after demurrer.*—A defendant will be allowed, where the plaintiff's declaration is held bad on demurrer, upon payment of the plaintiff's costs of the application and of the replication, to strike out the issues in fact upon some of the pleas, and need not move to rescind the order allowing him to plead several matters.—*Westover v. Brown* 215.

7. *Replevin or case.—Joinder of counts.*—*Held*, that a count in case cannot be joined with an ordinary count in replevin; but if intended to be a count in replevin under the provision in the latter part of section 1 Con. Stat. U. C, cap. 29, it was improper; the facts being, that the action was against a pound-keeper for detaining certain horses distrained *damage feasant*, and therefore a case "in which by the law of England replevin might be made;" and in either case the count must be struck out.—*Barber v. Armstrong*, 215.

8. *Declaration in trover.*—It is incorrect in a declaration in trover

to allege that the defendant converted to his own use *or*, wrongfully deprived the plaintiff, &c., (which is the form used in *Bullen & Leake's Prec.*).—*Bain v. McKay*, 471.

9. *Separating causes of action.*—Different causes of action included in same declaration may be severed, and tried separately.—*Fitzimmons v. McIntyre*, 119.

*Issues in law and fact—Form of roll.*—See JUDGMENT ROLL.

*Material Alterations in.*—See ISSUE BOOK.

*Irregularities in declaration.*—See IRREGULARITY.

## PROCESS CLERK.

See ATTACHMENT.

## PROCHEIN AMY.

See INFANT, 6, 7—SECURITY FOR COSTS, 2.

## PROHIBITION.

1. *Irregularity.*—Where in a Division Court case a Judge has jurisdiction over the subject matter, prohibition will not go for irregularities in mere matters of practice.—*Re McLean and McLeod*, 467.

2. *Striking out counts—Ousting jurisdiction of County Judge.*—A County Court Judge at the trial of a case made an order, upon the application of the plaintiff's counsel, striking out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction.



*Held*, that he had the power to do so; and that if prohibition had been applied for before trial, it would only have been granted as to that count.—*Fitzsimmons v. McIntyre*, 119.

### PROMISSORY NOTES.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

### PROVINCIAL JURISDICTION.

See **PATENT**, 2.

### QUO WARRANTO.

See **MUNICIPAL ELECTIONS.**

### RECORD.

*What it should contain*—*C. L. P. Act, sec. 77.*]—Issues in law having arisen on the same pleadings with issues in fact, the former, which had been already argued but not determined, were omitted from the *nisi prius* record:

*Held*, an irregularity in omitting these issues, on which contingent damages might have been assessed; and plaintiff was ordered, after verdict, to amend the record by inserting them.

The question, how far the *nisi prius* record should be a full transcript of the pleadings, discussed.—*Grant v. Palmer et al.* 301.

### RECORDS OF COURT.

*Reference to, by Judge.*]—See **SECURITY FOR COSTS**, 3.

### RELATOR.

*Right of second, to attack first as collusive.*]—See **MUNICIPAL ELECTIONS**, 8.

### REPLEVIN.

Section 18, Con. Stat. U. C. cap. 29, applies only to cases of a wrongful taking and detention within the latter part of section 1 of that act.—*Barber v. Armstrong*, 153.

*Replevin or case.*—*Joinder of Counts.*]—See **PLEADING**, 7.

### RESIGNATION.

*Of municipal councillor.*]—See **MUNICIPAL ELECTIONS**, 9.

### RETAKING POSSESSION.

See **EJECTMENT**, 2.

### RETURNING OFFICER.

*Improper conduct of.*]—See **MUNICIPAL ELECTIONS**, 10.

### SANDWICH, TOWN OF.

*Municipal Councillors.*]—The town of Sandwich is only entitled to three councillors in addition to a mayor and reeve to be elected by the people.—*Reg. ex rel. Arnold v. Wilkinson*, 20.

### SCI. FA.

See **PATENT**, 2.

### SECOND ACTION.

See **SECURITY FOR COSTS**, 1.

### SECURITY FOR COSTS.

1. *Ejectment*] *Act, sec. 76.*]—*Held*, that the [mere] fact of a second ac

tion of ejectment being brought between the same parties, and for the same land, is no reason for ordering security for costs, if the costs of the first action have been paid, and the second action brought in good faith.—*Armstrong v. Montgomery*, 461.

2. *Next friend*.] — Where a plaintiff sues with her brother-in-law, with whom she lives, as next friend, he will not be ordered to give security for costs, even though there is a doubt as to his solvency.—*Gardner v. Graham*, 463.

See INFANT, 7.

3. *State of cause*.]—On applications for security for costs the state of the cause should be shewn on affidavit; but to supply a defect in this respect, a Judge may, in his discretion, look at the records of the Court.—*Hall v. Brigham*, 464.

### SET OFF.

See COSTS, 1.

### SETTLEMENT BETWEEN PARTIES.

See ATTORNEY, 1.

### SEVERAL PLEAS.

See PLEADING, 4, 5.

### SHEWING CAUSE.

*Shewing cause to rule in first instance*.] — See ARBITRATION AND AWARD, 4.

### SHORT NOTICE OF TRIAL.

See NOTICE OF TRIAL, 2.

### STATE OF CAUSE.

See SECURITY FOR COSTS, 3.

### SPECIAL ENDORSEMENT.

*Special endorsement*.]—A writ of summons was specially endorsed for interest on the balance of an account, and for protest charges on an unaccepted draft.

*Held*, that the endorsement was right as to the interest, but not as to protest charges.

*Bank of Montreal v. Harrison*, 4 Prac. R. 331, explained.—*Sinclair v. Chisholm*, 270.

### STATUTES.

Con. Stat.	Can. cap.	9,	See Indian.
"	"	"	70, secs. 3, 4, See Execution, 2.
"	"	U. C.	19, sec. 109, See Division Court, 2.
"	"	"	23, sec. 9, See Patent, 1.
"	"	"	24, sec. 5, See Arrest, 2.
"	"	"	27, sec. 76, See Security for costs, 1.
"	"	"	29, sec. 1, See Replevin.
"	"	"	29, sec. 18, See Replevin, Pleading, 7.
"	"	"	54, sec. 97, s-s. 5, See Municipal Elections, 9.
"	"	"	57, sec. 7, See Fence Viewers.
"	"	"	74, See Infant.
"	"	"	76, See Apprentice.
"	"	"	126, secs. 3, 8, See Justice of the Peace.
C. L. P. Act.	sec. 31,	See Arrest, 2.	
"	"	77,	See Record.
"	"	122,	See Arbitration and Award, 1.
"	"	167,	See Arbitration and Award, 6.
"	"	184, 188,	See Evidence, 4.

- 20 Vic. cap. 94, *See* Statutes (Interpretation of ).  
 27 & 28 Vic. cap. 17, sec. 3, cl. C, *See* Insolvent Acts, 1  
 " " " " 18, *See* Certiorari, 3.  
 29 Vic. cap. 18, sec. 29, *See* Insolvent Acts, 2.  
 29 & 30 Vic. cap. 45, *See* Apprentices—Infant.  
 " " " " 51, sec. 428, *See* Statutes (Interpretation of ).

## ONTARIO ACTS.

- 29 & 30 Vic. cap. 51, sec. 73, *See* Municipal Elections, 3.  
 " " " 51, secs. 110, 113, *See* Municipal Elections, 9.  
 " " " 51, secs. 131, 178, *See* Municipal Elections, 12  
 31 Vic. cap. 1, sec. 7, s.-s. 13, *See* Parliamentary Elections, 1.  
 " " 24, secs. 1, 2, *See* Costs, 1, 2.  
 " " 30, sec. 6, *See* Statutes (Interpretation of )  
 32 Vic. cap. 6, Reform Act, sec. 17, *See* Issue County Court, 1, 2  
 " " 6, sec. 18, *See* Notice for a jury, County Court, 3.  
 " " 21, sec. 52, (Controverted Elections) *See* Parliamentary Elections, 1.  
 " " 23, *See* Division Court, 2.  
 " " 32, *See* Certiorari, 3.  
 " " 46, sec. 8, sec. 6, s.-s. 2, *See* Fence Viewers, 1.

## CANADA ACTS.

- 31 Vic. cap. 94, sec. 2, (32, 33 Vic. XIII.)  
*See* Evidence, 3.  
 32 & 33 Vic. cap. 6, *See* Indian.  
 " " " 11, sec. 24, *See* Patent, 1.  
 " " " 29, sec. 11, *See* Venue (Change of) 1.

## STATUTES, INTERPRETATION OF.

*Special and General Acts.*]—A special Act of Parliament cannot be repealed by a general enactment, except when there is express reference to it; 20 Vic. cap. 94, therefore is not repealed by 29-30 Vic.

cap 51, sec. 428.—*Regina ex rel. Arnold v. Wilkinson*, 20.

## STATUTE LABOR.

*See* ASSESSMENT.

## STAYING PROCEEDINGS.

*Staying proceedings until costs of former action paid.*]—An action was prosecuted to trial in the name of a plaintiff who was dead before the commencement of the suit, but of this the attorney was ignorant, the action having apparently been brought under a mistake of facts. The death of the plaintiff being shewn at the trial, the record was struck out by the judge. An action was subsequently brought for the same cause by the parties properly entitled to sue: *Held*, that this action was not vexatiously brought, so as to entitle the defendant to stay proceedings in such second action until the costs of the first were paid.—*Davis v. Weller*, 150.

*See* ARBITRATION AND AWARD, 5.

## STOCK.

*When bound by fi. fa.*]—*See* EXECUTION, 2.

## STRIKING OUT.

*Counts in declaration.*]—*See* PROHIBITION, 2.

*Defendant in ejectment.*]—*See* EJECTMENT, 3.

*Issues after demurrer.*]—*See* PLEADING, 6.

## SUNDAY.

*Coroner's inquest on.*]—See CORONER.

## TAXATION.

See ARBITRATION. 5.—COSTS, 6.

## TOWN AGENT.

See ATTORNEY, 2.

## TROVER.

See PLEADING, 8.

## VACANT POSSESSION.

See EJECTMENT, 4.

## VEN. EX.

*Amending return to.*]—See EXECUTION, 1.

## VENUE (CHANGE OF).

1. *In criminal cases*—32-33 Vic., cap. 29, sec. 11.]—*Held*, that 32-33 Vic. cap. 29, sec. 11, does not authorize any order for the change of the place of trial of a prisoner in any case where such change would not have been granted under the former practice, the statute only affecting procedure.—*The Queen v. Murdoch McLeod*, 181.

2. *Fair trial.*]—When, in an action for a libel contained in a newspaper, the plaintiff lays the venue in a county distant from that in which the newspaper is published and the parties reside, so

that the trial may be free from local influences, it will not be changed to the county in which the cause of action arose, merely because it would be more convenient and less expensive to try the case in the latter county.

The obtaining of a fair trial must overbear every consideration of convenience.—*Blackburn v. Cameron et al*, 341.

3. *Balance of convenience*—*Fair trial.*]—An application to change the venue in an action of libel to a county where the cause of action arose and the witnesses resided, and whereby there would be a great saving of expense was opposed on the ground that a fair trial could not be had in such county, owing to alleged prejudice against the plaintiff, arising from a political excitement occasioned by an election held there three years previously:

*Held*, that the venue must be changed; the action being for a private injury and not a matter of public interest, and the peculiarities case being against the belief that a fair trial could not be obtained, as alleged, and the preponderance of convenience and expense being greatly in favor of the change.—*Roche v. Patrick*, 210.

4. *Preponderance of convenience and expense.*]—A defendant when applying to change the venue on the ground of the preponderance of convenience and expense, should suggest in his affidavits the number of witnesses the plaintiff is likely to call, and where they reside.

Cases on application of this kind considered.—*Diamond v. Grey et al*, 33.



## VERDICT.

See ATTACHMENT OF DEBTS, 1.



## WRIT.

*Of attachment.*]-See ATTACHMENT.

*Of summons.*]-See SPECIAL ENDORSEMENT.

*Of sub. ad res. on information of intrusion.*]-See INFORMATION OF INTRUSION.

*Amending return to Ven. Ex.*]-See EXECUTION, 1.











